TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 184.

MERRITT COX AND J. D. CLARDY, PLAINTIFFS IN ERROR,

vs.

THE NATIONAL BANK OF THE STATE OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 25, 1877.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, the 2nd day of October, A. D. 1876.

Present, the honorable Bland Ballard, judge of the United States for the Kentucky district.

Caption.

THE NATIONAL BANK OF THE STATE OF NEW York, plaintiff,
vs.
MERRITT COX, WILLIAM F. COX, WILLIAM Cowan, & J. D. Clardy, defendants.

Be it remembered that heretofore, to wit, on the 25th day of April, 1876, came the plaintiff by Barret & Brown, its attorneys, and filed in the clerk's office of said court its petition against the above named defendants, which is as follows:

Petition.

In the circuit court of the United States, for the circuit and district of Kentucky.

THE NATIONAL BANK OF THE STATE OF NEW York, pl'ff,
vs.
MERRITT COX, WM. F. COX, WM. COWAN (THE said Wm. F. Cox and Wm. Cowan composing the firm of, and trading under the name and style of Cox & Cowan), and J. D. Clardy, def'ts. } Petition.

2 The plaintiff, the National Bank of the State *of the State* of New York, states that it is a resident and citizen of the State of New York within the terms and meaning of the laws of the United States; and that it is a banking corporation created, existing and acting under and by authority of an act of Congress of the United States, approved 3rd July, 1865, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and the several acts amendatory thereof. This plaintiff is by the said acts of Congress authorized and empowered to sue and be sued, to contract and be contracted with, to buy and sell promissory notes and bills of exchange, to discount bills of exchange, and to do and perform all things connected with or incident to a general banking business.

The defendants Merritt Cox, W. F. Cox, William Cowan, and J. D. Clardy are, and each of them is, and at the several times hereinafter mentioned each of them was a resident and citizen of the State of Kentucky and of the district of Kentucky.

The defendants W. F. Cox and Wm. Cowan were at the several times hereinafter mentioned partners in trade within the State of Kentucky, under the firm name and style of Cox and Cowan.

This pl'ff further says that on the 3rd day of August, 1875, the defendant Merritt Cox drew his certain bill of exchange, dated as of said

date at Hopkinsville, Ky., addressed to the defendants W. F. Cox and William Cowan, by their said firm name of Cox & Cowan, at
3 New York, N. Y., wherein and whereby he ordered and requested the said Cox & Cowan (a firm composed as aforesaid) to pay to the order of the defendant J. D. Clardy the sum of five thousand dollas ($5,000) eighty days after said date, for value received, and to charge the same to account of renewing a bill for same amount and names, due 3rd August, 1875.

The said bill of exchange was signed by the defendant Merritt Cox with his proper hand, and being so signed and made was by the defendants Cox & Cowan (a firm composed of the defendants Wm. F. Cox and Wm. Cowan, as aforesaid) accepted in writing by them in their said firm name upon and across the face thereof, and was by the defendant J. D. Clardy, the payee thereof, endorsed, "Pay to the order of Edward M. Wright & Co., of New York City," over his proper signature, and delivered to Edward M. Wright & Co., of New York City, for valuable consideration. All of which was before the maturity of said bill of exchange. Whereby the said bill of exchange became and was before maturity thereof the property of the said Edward M. Wright & Co., and the defendants Cox & Cowan becameand were bound to pay the same at maturity to said Edward M. Wright & Co.

And afterwards, and before maturity of said bill of exchange, the same was by the said Edward M. Wright & Co. endorsed and delivered for valuable consideration to this plaintiff, and this plaintiff discounted
4 the same before maturity, whereby this plaintiff became, before maturity thereof, the holder and owner of said bill of exchange and have ever since been, and the defendants Cox & Cowan, aforesaid, became and were bound to pay the same at maturity to this plaintiff.

And afterwards, on, and at the day of the maturity of said bill of exchange, this plaintiff caused the said bill to be placed in the hands of one J. L. Slosson, a notary public in and for the city and State of New York, duly commissioned and qualified as such, for proper and legal presentment and demand of payment, and the said notary on said day did present said bill of exchange at various places in the city of New York, and made diligent and careful search for the said defendants, acceptors thereof, to wit, Cox & Cowan, and for their place of business, but could not find them, or either of them, nor any place of business of them, or either of them, save the office of Edward M. Wright & Co., in said city, which he was informed and believed was and is the only place of business of the said acceptors, Cox & Cowan, or of either W. F. Cox or Wm. Cowan, in said city. And the notary did thereupon then and there present said bill of exchange at said office to the person in charge thereof and demanded payment thereof, which was refused.

And thereupon the said notary did duly and properly protest said bill of exchange for non-payment, and also the drawer, endorsers and acceptors thereof, of which the defendants, and each of them, had due notice.

The said original bill of exchange is herewith filed, and is made
5 part hereof. The said notarial protest of said bill of exchange is herewith filed and is made part hereof.

No part of said bill of exchange has been paid, but the whole is past due and owing to this pl'ff.

The plaintiff says that by the laws of the State of New York at the time of the drawing of said bill of exchange, and continuously ever since, the legal rate of interest in said State was and is the rate of seven

per centum per annum, and that plaintiff is entitled to recover interest at said rate on said bill of exchange from and after its maturity.

Wherefore plaintiff prays for judgment against the defendants, Merritt Cox, W. F. Cox, Wm. Cowan, and J. D. Clardy, in the sum of five thousand dollars, with interest thereon from the 25th October, 1875, till paid, at the rate of 7 per centum per annum, and for costs and all proper relief.

BARRETT & BROWN,
For Plaintiff.

The notarial protest above referred to is as follows:

Protest.

UNITED STATES OF AMERICA,
State of New York, ss:

I, J. Lawrence Slosson, notary public, duly admitted and sworn, dwelling in the city of New York, do hereby certify that on the 25th day of October, in the year of our Lord one thousand eight hundred and seventy-five, at the request of the holders thereof, the original bill hereto annexed was presented by me at various places in said city, and I
6 there made diligent and careful search and inquiry for the acceptors thereof, to wit, Cox & Cowan, and their place of business, but I could not find them, or either of them, nor any place of business of them, or either of them, save the office of Edward M. Wright & Co., in said city, which I was then informed and believed, and now believe, was and is the only office or place of business of the said acceptors, Cox & Cowan, or either of them, in the city of New York. Whereupon I presented said bill at said office and demanded payment thereof, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawers, acceptors, and endorsers of the said bill, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interest already incurred, and hereafter to be incurred, for want of payment of the said bill.

In testimony veritatis,

[L. S.] J. LAWRENCE SLOSSON,
Notary Public.

The bill of exchange above referred to is as follows:

Bill of exchange.

$5,000.] HOPKINSVILLE, KY., *Aug't 3rd*, 1875.

Eighty days after date pay to the order of J. D. Clardy five thousand dollars, value received, and charge to account of renewing a bill for same am't and names, due Aug't 3rd, 1875.

MERRITT COX.

To Mess. COX & COWAN,
New York, N. Y.

7 The endorsement on the face of said bill is as follows:

Accepted.

COX & COWAN.

The endorsements on the back of said bill are as follows:

Pay to the order of Edward M. Wright & Co., of New York City.
J. D. CLARDY.

EDWARD M. WRIGHT & CO.

Upon the foregoing petition the following process issued, to wit:

Summons.

The President of the United States of America to the marshal of the Kentucky district, greeting:

You are commanded to summon Merritt Cox, W. F. Cox, Wm. Cowan, and J. D. Clardy to answer on the first day of the next October term of the circuit court of the United States for the district of Kentucky, to be held at the city of Louisville, a petition against them in said court by the National Bank of the State of New York, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next term of said court.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 25th day of April, in the year of our Lord 1876, and of our Independence the 100th.

[L. S.]

SAM'L B. CRAIL,
C. C. C. K. D.,
By HENRY F. CASSIN,
Deputy.

8 Upon which process the marshal made the following return, to wit:

Marshal's return.

Executed this summons on the within named def'ts, Merritt Cox, W. F. Cox, Wm. Cowan, & J. D. Clardy, by delivering to each of them a copy thereof, this 26th day of April, 1876.

POLK CAUSLER, *Sp'l Bailiff*,
For E. H. MURRAY, *U. S. M.*

And afterwards, on the 16th day of August, 1876, came the defendants, Merritt Cox and J. D. Clardy, by Walter Evans, their attorney, and filed in the clerk's office their separate answer herein.

The answer of Merritt Cox is as follows:

Answer of Merritt Cox.

In the circuit court of the United States for the district of Kentucky.

NATIONAL BANK OF THE STATE OF NEW York, plaintiff,
vs.
W. F. COX & WM. COWAN, LATE PARTNERS as Cox & Cowan, Merritt Cox, and J. D. Clardy, defendants.

The defendant Merritt Cox, for separate answer to the plaintiff peti-

tion in the above styled action, states that it is true this defendant made & executed the bill of exchange sued on herein for $5,000, bearing date the 3rd day of August, 1875, as drawer thereof. He says he drew said bill on his co-defendants Cox & Cowan, who accepted the same, in favor of his co-defendant J. D. Clardy.

He denies, however, that he has any knowledge or information
9 thereof sufficient to form a belief, 1st, as to whether the plaintiff paid a valuable consideration for said bill; 2nd, as to the truth of the statement of the plaintiffs in their petition that they became the holders of said bill before its maturity; or, 3rd, as to the truth of the statement by the plaintiffs in their petition that the said bill was indorsed to them before its maturity.

This defendant denies that the notary public mentioned in the plaintiff's petition, or any one for him, or any other person, made diligent inquiry or search for the said acceptors of said bill, to wit, said Cox & Cowan, or for either of them, at or before the maturity of said bill. He denies that said notary public, or any other person for him, at or before the maturity of said bill, made diligent search or inquiry for the office or place of business of said acceptors, or for the office or place of business of either of them. If said notary made any such search or inquiry he learned of the residence & place of business of said acceptors, and each of them, & that the same were in Christian County, Kentucky.

This defendant denies that W. F. Cox & Wm. Cowan or Cox & Cowan, or either of them, ever had an office, place of business, or counting-room in New York City or State, & he denies that either of them has in fact been in said city or State since the 1st day August, 1875. He denies that the office or place of business of Edward M. Wright & Co., of New York (which firm indorsed said bill to plaintiffs), was ever
10 in any way the office, place of business, or residence of said W. F. Cox or Wm. Cowan, or of either of them, nor of said Cox & Cowan, as a partnership, firm, or otherwise, though the said Edward M. Wright & Co. were among the factors employed by the said Cox & Cowan in the transaction of business in said city of New York in 1874 & 1875.

This defendant denies that said notary public, or the plaintiffs, or either of them, had any right to make demand for the payment of said bill at the office or place of business of Edward M. Wright & Co., in New York City or State, or at any other place in said city or State.

He denies that the said bill of exchange sued on was payable at any place in New York City or State, or elsewhere than in Christian County, Kentucky.

He denies that any demand for payment of said bill was, on the day of its maturity, made of or upon the acceptors thereof, said Cox & Cowan, or of or upon either of them, in person or otherwise.

He denies that any demand for payment of said bill was, on the day of its maturity, made at the place of business of the said acceptors, Cox & Cowan, or at the place of business of either of them.

He denies that any demand for the payment of said bill was, on the day of its maturity, made at the residence of said acceptors, or at the residence of either of them.

He denies that any demand whatever was made in any way upon said acceptors, or upon either of them, for payment of said bill, at or on the day of the maturity thereof, but, on the contrary, this defendant says that the plaintiffs and all other holders of said bill at its maturity
11 utterly failed and neglected to make any sort of demand of pay-

ment of said bill of or upon the acceptors thereof, said Cox & Cowan, or of or upon either of them.

He denies that he ever received, or that there was ever given to him, any notice of the dishonor of said bill, or of the failure of said acceptors, and each of them, to pay the same at maturity. He denies that he was ever notified of any demand of payment of said bill, on the day of its maturity, of or upon the acceptors thereof, or of or upon either of them, nor of a failure or refusal by them, or either of them, to pay the same on such demand or otherwise.

He denies that he ever had or received notice of the protest of said bill made by the notary mentioned in plaintiff's petition, as described therein, and he says said protest was unwarranted & impertinent. He says there was no other protest of said bill.

This defendant, further answering, states that the said bill of exchange sued on herein was executed & drawn in the city of Hopkinsville, Kentucky, by this defendant, on Cox & Cowan, in renewal of another bill for the same amount, & was addressed to Cox & Cowan, New York City, N. Y., but for what reason it was so addressed, if there was any reason therefor, this defendant does not know, but supposes it was simply a copying of the original bill by the person who filled up the blank for said bill, this person being Mr. J. A. Wallace, cashier of
12 the Bank of Hopkinsville, in Kentucky, who had no interest in said bill, and said bank had no interest in it nor control over it.

On the day said bill was drawn by this defendant the same was accepted by the said Cox & Cowan, and it was so accepted in said city of Hopkinsville, Kentucky, and not elsewhere, as plaintiffs knew when they took said bill, and on the same day, and also in said city of Hopkinsville, said bill was endorsed by the defendant J. D. Clardy to Edward M. Wright & Co., of New York, and on the same day and also in the said city of Hopkinsville, Kentucky, the said bill so endorsed was delivered to the said Edward M. Wright & Co., who there had full notice of all of the said facts pertaining to the execution of said bill.

This defendant says that the said W. F. Cox, one of Cox & Cowan, then, viz, on the 3rd day of August, 1875, and at all times since, has resided in Christian County, Kentucky, a short distance from Hopkinsville, which facts the plaintiffs and also said Edward M. Wright & Co. knew when they severally took said bill, and when the same matured, and at all intermediate times. Said W. F. Cox never resided in New York City or State, and never had a place of business in either.

Defendant says that said William Cowan, then, viz, on the 3rd day of August, 1875, and at all times since has, resided in said city of Hopkinsville, Kentucky, which facts the plaintiffs, and also said Ed-
13 ward M. Wright & Co., knew when they severally took said bill, and when the same matured, and at all intermediate times. Said Cowan never resided in New York City or State, and never had a place of business in either.

Each member of the said firm of Edward M. Wright & Co., to wit, Edward M. Wright, John B. Duer, and Gouvenear Morris, jr., resided in said city of New York, or at least had their place of business there, and all of them were well known to plaintiffs both before and after the said Edward M. Wright & Co. endorsed the said bill to the plaintiffs (which endorsement to the plaintiffs was made in New York), and the plaintiffs could at any time, by the use of the most ordinary diligence & inquiry, have learned of the residence & place of business of said Cox & Cowan, and each of them, both of which and both of whom were

perfectly well known to said Edward M. Wright & Co., as the plaintiffs knew at the time.

This defendant, and also his co-defendant J. D. Clardy, then and now, as they also have for at least fifteen years past, resided in said Christian County, Kentucky, Newstead being all the time the post-office of this defendant.

Defendant also states that the said Cox & Cowan had their place of business in Hopkinsville and in Christian County, Kentucky, and not elsewhere at the time the plaintiffs took said bill, and also when it matured, and they had neither residence nor place of business in
14 New York City or State then nor at any time, and these facts were well known to the plaintiffs and also to said Edward M. Wright & Co. at the time they severally took said bill, and when it matured, and at all intermediate times.

This defendant is advised to say, and does say, that by the law of the State of New York, where a bill of exchange is endorsed to a holder as collateral security for a pre-existing debt due to the endorsee, such endorsee thereof is not a holder of such bill for value, but holds the same, subject to all defenses and equities which could be urged against the endorser who passed the bill to such endorsee.

Defendant insists that by reason of the facts herein stated, and by reason of the negligence of the plaintiffs in failing to make demand of payment of said bill at its maturity of & from the acceptors thereof, or either of them, and by reason of their failure to give notice to this defendant of the dishonor of said bill he is released and discharged from all liability to pay the same.

Wherefore this defendant, having fully answered, prays to be dismissed hence with his costs and with all other proper relief.

WALTER EVANS,
Counsel for defendant Merritt Cox.

STATE OF KENTUCY,
County of Christian:

Merritt Cox says he believes the statements made in the fore-
15 going answer are true.

MERRITT COX.

Sworn to before me by the above-named Merritt Cox this 31st day of July, 1876.

J. I. LANDES,
United States Commissioner.

The answer of J. D. Clardy, above referred to, is as follows:

Answer of J. D. Clardy.

In the circuit court of the United States for the district of Kentucky.

NATIONAL BANK OF THE STATE OF NEW YORK, plaintiffs,
against
W. F. COX & WM. COWAN, LATE PARTNERS as Cox & Cowan, Merritt Cox, & J. D. Clardy, defendants.

The defendant J. D. Clardy, for separate answer to the plaintiffs' petition in the above-styled action, states that it is true this defendant

did endorse the bill sued on. He denies, however, that he has any knowledge or information thereof sufficient to form a belief, 1st, as to whether the plaintiffs paid a valuable consideration for said bill; 2nd, as to the truth of the statement by the plaintiffs in their petition that they became the holders of said bill before its maturity; or, 3rd, as to the truth of the statement by the plaintiffs in their petition that the said bill was endorsed to them before its maturity.

16 This defendant denies that the notary public mentioned in the plaintiffs' petition, or any one for him, or any other person made diligent enquiry or search for the said acceptors, Cox & Cowan, or for either of them, at or before the maturity of said bill. He denies that the said notary, or any other person for him at or before the maturity of said bill, made diligent search and inquiry for the office or place of business of said acceptors, or for the office or place of business of either of them. If said notary made any such search or inquiry he learned of the residence and of the place of business of said acceptors, and of each of them, and that the same were in Christian County, Kentucky.

This defendant denies that W. F. Cox and Wm. Cowan, or Cox & Cowan, or either of them, ever had an office, place of business, or counting-rooms in New York City or State, and he denies that either of them has, in fact, been in said city or State since the 1st day of August, 1875. He denies that the office or place of business of Edward M. Wright & Co., of New York (which firm endorsed said bill to the plaintiffs), was ever in any way the office, place of business, or residence of said Wm. F. Cox or Wm. Cowan, or of either of them, nor of said Cox and Cowan as a partnership firm or otherwise, though the said Edward M. Wright & Co. were among the factors employed by the said Cox & Cowan in the transaction of business in New York in 1874 & 1875.

17 This defendant denies that said notary public, or the plaintiffs, or either of them, had any right to make demand of payment of said bill at the office or place of business of Edward M. Wright & Co., in New York City or State, or at any other place in said city or State.

He denies that said bill of exchange sued on was payable at any place in New York City or State, or elsewhere than in Christian County, Kentucky.

He denies that any demand for payment of said bill was, on the day of its maturity, made of or upon the acceptors thereof, said Cox & Cowan, or of or upon either of them, in person or otherwise.

He denies that any demand for the payment of said bill was, on the day of its maturity, made at the place of business of said acceptors, Cox & Cowan, or at the place of business of either of them.

He denies that any demand for the payment of said bill was, on the day of its maturity, made at the residence of said acceptors, or at the residence of either of them.

He denies that any demand whatever was made in any way *made* upon said acceptors, or upon either of them, for payment of said bill, at or on the day of its maturity, but on the contrary, this defend-

18 ant says that the plaintiffs, and all other holders of said bill at its maturity utterly failed and neglected to make any demands whatever of payment of said bill, of or upon the acceptors thereof, said Cox & Cowan, or of or upon either of them.

He denies that he ever received or that there was ever given to him any notice of the dishonor of said bill, or of the failure of said acceptors, and of each of them, to pay the same at maturity.

He denies that he was ever notified of any demand of payment of

said bill, on the day of its maturity, of or upon the acceptors thereof, or of or upon either of them, or of a failure or refusal by them, or either of them, to pay the same on such demand, or otherwise.

He denies that he ever had or received notice of the protest of said bill, except that he received notice of protest made by the said notary in New York, as set out in plaintiffs' petition, which protest this defendant avers was unwarranted by law, and altogether impertinent.

No other protest of said bill was ever made.

This defendant, further answering, states that the said bill of exchange sued on herein was executed and drawn in the city of Hopkinsville, Kentucky, by Merritt Cox on Cox & Cowan, in renewal of another bill for the same amount, and was addressed to Cox & Cowan,
19 New York, N. Y., but for what reason it was so addressed, if there was any reason therefor, this defendant does not know, but supposes it was simply a copying of the original bill by the person who filled up the blank for said bill, said person being Mr. J. A. Wallace, cashier of the Bank of Hopkinsville, Kentucky, who had no interest in said bill, and said bank had no interest in it nor control over it. On the day said bill was drawn the same was accepted by said Cox & Cowan, and it was so accepted by them in said city of Hopkinsville, and not elsewhere, as was well known to plaintiffs when they took said bill. And on the same day, and also in said city of Hopkinsville, said bill was indorsed by the defendant to Edward M. Wright & Co., of New York, and on the same day, and also in the said city of Hopkinsville. Kentucky, the said bill so indorsed was delivered to the said Wright & Co., who then had full knowledge of all the said facts pertaining to the execution of said bill, and which knowledge they soon afterwards imparted to plaintiffs.

This defendant states that the said W. F. Cox, of Cox & Cowan, then, viz, on the 3rd day of August, 1875, and at all times since, has resided in Christian County, Kentucky, a short distance from Hopkinsville, which facts the plaintiffs, and also said Edward M. Wright & Co., knew
20 when they severally took said bill, and when the same matured, and at all intermediate times. Said W. F. Cox never resided in New York City or State, and never had a place of business in either. Defendant says that said Wm. Cowan then, viz, on the 3rd day of August, 1875, and at all times since, has resided in said city of Hopkinsville, Kentucky, which facts the plaintiffs, and also said Edward M. Wright & Co., knew when they severally took said bill, and when the same matured, and at all intermediate times. Said Cowan never resided in New York City or State, and never had a place of business in either. Each member of the firm of Edward M. Wright & Co., to wit, Edward M. Wright, John B. Duer, & Gouvenuer Morris, jr., resided in the said city of New York, or at least had their place of business there, and all of them were well known to the plaintiffs, both before and after the said Edw'd M. Wright & Co. indorsed the said bill to the plaintiffs (which indorsement to the plaintiffs was made in New York), and the plaintiffs could at any time, by the use of the most ordinary diligence, and inquiry, have learned of the residence and place of business of said Cox & Cowan, and each of them, both of which & both of whom were perfectly well known to said Wright & Co., as the plaintiffs knew at the time.

This defendant and also his co-defendant Merrit Cox do now,
21 & have at all times for the last thirteen years, resided in Christian County, Kentucky, and the post-office of each is Newstead in said county.

Defendant also states that the said Cox & Cowan had their place of business in Hopkinsville, & in Christian County, Kentucky, and not elsewhere, at the time the plaintiffs took said bill, & also when the same matured, and they had neither residence nor place of business in New York City or State, then, nor at any time, & these facts were known to the plaintiffs and also to said Edw'd M. Wright & Co. at the time they severally took said bill and when the same matured, and at all intermediate times.

This defendant is advised to say, and does say, that by the law of the State of New York, where a bill of exchange is indorsed to the holder as collateral security for a pre-existing debt due to the indorsee, such indorsee thereof is not a holder of such bill for value, but holds the same subject to all defenses & equities which could be urged against the indorser who passed the bill to such indorsee.

This defendant insists that by reasons of the facts herein stated and by reason of the negligence of the plaintiffs in failing to make
22 demand of payment of said bill at its maturity of & from the acceptors thereof, or either of them, & by reason of their failure to give notice to this defendant of the dishonor of said bill he is released and discharged from all liability to pay the same.

Wherefore this defendant, having fully answered, prays to be dismissed hence with his costs & with all proper relief.

WALTER EVANS,
Counsel for Defendant J. D. Clardy.

STATE OF KENTUCKY,
County of Christian;

J. D. Clardy says he believes the statements made in the foregoing answer are 8*th*.

J. D. CLARDY.

Sworn to before me by the above named J. D. Clardy, this 8th day of August, 1876.

J. P. LANDER,
United States Commissioner, Kentucky District.

And at another term of our said court held for its October term, 1876, to wit, on Tuesday December 12th, 1876, came the plaintiffs, by Jno. Mason Brown, its attorney. Came also the defendants, by Walter Evans, their attorney. The defendants J. D. Clardy and Merritt Cox, by leave of court filed their amended answer herein. The defendants, by their attorney, filed their exceptions to parts of the deposition
23 of J. D. Slosson. Come also the plaintiffs, by their attorney, and filed its exceptions to the depositions of W. F. Cox and Wm. Cowan.

Thereupon came a jury, to wit, J. K. Goodloe, St. John Boyle, and D. W. Armstrong, who were elected, tried, and sworn well and truly to try the issue joined.

The evidence and arguments of counsel were concluded, and there not being time for the court to deliver its instructions to the jury to-day, time is taken until to-morrow.

The amended answer of J. D. Clardy, above referred to, is as follows:

Am'd ans. of J. D. Clardy.

Circuit court of the United States, district of Kentucky.

NATIONAL BANK OF THE STATE OF NEW YORK, pl'ffs,
vs.
COX & COWAN, MERRITT COX & J. D. CLARDY, def'ts.

The defendant, J. D. Clardy, for amendment to his answer filed herein, says that in said answer, after stating in substance that the bill sued on was drawn by Merritt Cox & accepted by Cox & Cowan and indorsed by himself, all at Hopkinsville, Ky., he also stated on the 4th page of said answer as filed that the bill sued on was thereupon on the same day and at the same place delivered to Edward M. Wright & Co.

This defendant, for amendment, now says that the original bill,
24 of which the one in suit was a renewal, was at the maturity thereof owned and held by the plaintiffs, and that the same was renewed with their consent, & for the purpose the said original bill was sent by them to Hopkinsville, Ky., and, after the renewal was effected, the bill in suit was delivered to them and to said Wright & Co., in Hopkinsville, after the said acceptance and indorsement.

Defendant says he did not learn that the plaintiffs then held said paper and that they had sent it to Hopkinsville for renewal until after his answer was filed and the deposition of E. M. Wright was taken herein. He prays as in his original answer.

WALTER EVANS,
Att'y for J. D. Clardy.

The amended answer of Merritt Cox above referred to is as follows, to wit:

Amended answer of Merritt Cox.

Circuit court of the United States for the district of Kentucky.

THE NATIONAL BANK OF THE STATE OF NEW York, pl'ffs,
vs.
COX & COWAN, MERRITT COX, & J. D. CLARDY, defendants.

25 The defendant, Merritt Cox, for amendment to his answer filed herein, says that in said answer, after stating in substance that the bill sued on was drawn by himself and accepted by Cox & Cowan, and indorsed by J. D. Clardy, all at Hopkinsville, Ky., he also stated on the 4th page of said answer, as filed, that the bill sued on was thereupon, on the same day and at the same time and place, delivered to Edward M. Wright & Co. This defendant, for amendment, now says that the original bill of which the one in suit was a renewal was, at the maturity thereof, owned and held by the plaintiffs, and that the same was renewed with their consent, and for the purpose the said original bill was sent by them to Hopkinsville, Ky., and after the renewal was effected the bill in suit was delivered to them and to said Wright & Co., in Hopkinsville, after the said acceptance and indorsement.

Defendant says he did not learn that the plaintiffs then held said paper, and that they had sent it to Hopkinsville for renewal, until after his answer was filed and the deposition of E. M. Wright was taken herein.

He prays as in his original answer.

WALTER EVANS,
Att'y for Merritt Cox.

26 And on another day of our said term of our said court, to wit, on Wednesday, December 13th, 1876, came again the parties, by their attorneys; came also the jury impaneled and sworn herein.

The instructions of the court having been delivered, the jury retired to consider of their verdict, and returned into court the following verdict, to wit:

Verdict.

"We, of the jury, find for the plaintiffs the debt in the petition demanded, with interest from the 25th October, 1875.

"ST. JOHN BOYLE,
"*Foreman.*"

Judgment.

It is therefore considered by the court that the plaintiff, the National Bank of the State of New York, recover of the defendants, Merritt Cox, William F. Cox, William Cowan, and J. D. Clardy, the sum of five thousand dollars, with interest thereon at the rate of six per centum per annum from the 25th day of October, 1875, until paid, also its costs herein expended.

Thereupon the defendants, Merritt Cox and J. D. Clardy, by their attorneys, tendered their bill of exceptions herein, which is signed and sealed by the court and ordered to be entered of record, and which is as follows:

27 *Bill of exceptions.*

NATIONAL BANK OF THE STATE OF NEW YORK
vs.
MERRITT COX ET AL. } Bill of exceptions.

Be it remembered that at the trial of this cause before the court and a jury, the plaintiffs, to sustain the issue on their part, offered and read in evidence to the jury the bill of exchange sued on in this action, as follows:

$5,000.00.] HOPKINSVILLE, KY., *August 3rd*, 1875.

Eighty days after date pay to the order of J. D. Clardy five thousand dollars, value received, and charge to account of renewing a bill for same amount & names.

MERRITT COX.

Due Aug. 3rd, 1875.
To Mess. COX & COWAN,
New York, N. Y.

E'dorsed on back as follows:

Pay to the order of Edward M. Wright & Co., of New York City.
J. D. CLARDY.

EDWARD M. WRIGHT & CO.

And they also read the protest of said bill by the notary, J. L. Slosson, as follows:

UNITED STATES OF AMERICA,
State of New York, ss:

I, J. Lawrence Slosson, notary public, duly admitted and sworn, dwelling in the city of New York, do hereby certify that on the twenty-fifth day of October, in the year of our Lord one thouand eight hundred and seventy-five, at the request of the holders thereof,
28 the original bill hereto annexed was presented by me at various places in said city, and I then made diligent and careful search and inquiry for the acceptors thereof, to wit, Cox & Cowan, and their place of business, but I could not find them, or either of them, nor any place of business of them or either of them, save the office of Edward M. Wright & Co., in said city, which I was then informed and believed, and now believed, was made and is the only office or place of business of said acceptors, Cox & Cowan, or either of them, in the city of New York, wherupon I presented said bill at said office and demanded payment thereof.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawers, acceptors, and endorsers of the said bill as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interest already incurred and hereinafter to be incurred, for want of payment of said bill.

In testimonium veritatus.

J. LAWRENCE SLOSSON,
Notary Public.

And also offered in evidence by competent witnesses facts tend-
29 ing to show that the *the* notary entrusted with said bill made reasonable and diligent enquiry for the acceptors and their place of business in New York City, at the place or places frequented by them when in said city, and could not, after such enquiry, find them or any place of business of them or either of them, and then demanded payment on the day of maturity in business hours at the place so frequented by them when in the city of New York, and that payment of said bill was then and there refused; that they caused enquiry to be made by the notary public, J. L. Slosson, in New York, on the 25th or 26th day of October, 1875, of E. M. Wright, a resident of New York City, New York, and one of the firm of E. M. Wright & Co., who endorsed said bill of exchange to plaintiffs, as to the post-office address respectively of said Merritt Cox & J. D. Clardy, and that said notary was then informed by said Wright that the post-office address of each of said defendants was Hopkinsville, Kentucky, and that said notary, on the 26th of October, 1875, mailed notices of protest of said bill to each of said defendants at Hopkinsville, Kentucky; but there was no evidence introduced which tended to show that plaintiffs or any one for them at any time made any other inquiries for the post-office address of either or both of said defendants.

And the said defendants, Merritt Cox and J. D. Cardy, to
30 sustain the issues on their part, offered and gave in evidence before the jury by competent witnesses facts tending to prove that the said bill of exchange was drawn by Merritt, Cox, accepted by Cox & Cowan, and endorsed by J. D. Clardy, all in the city of Hopkinsville,

Ky., and that it was there delivered to G. V. Thompson, to whom the bill of which the one in suit was a renewal had been sent by E. M. Wright & Co., who had endorsed the same to plaintiffs as collateral security, and had received it after maturity from the plaintiffs and holders for the purpose of having it renewed; that said Thompson sent the bill in suit to said Wright & Co., who immediately delivered it to plaintiffs, and informed them that it had been executed and accepted in Kentucky; that at the time of the execution and acceptance of said bill and at the time of its maturity the acceptors thereof, W. F. Cox & Wm. Cowan, composing the partnership firm of Cox & Cowan, each resided in Hopkinsville, Christian County, Kentucky, and had their place of business there and not elsewhere; that the plaintiffs, when they took said bill and when it was executed and when it matured, were informed and knew that the said residence and place of business of said Cox & Cowan and each of them was in said city
31 of Hopkinsville, Kentucky, at the times aforesaid, to wit, when the said bill was executed and when it matured and at all intermediate times, and that said bill had been executed and accepted there.

That there was no presentment of said bill nor demand of payment of same to or upon the said acceptors or either of them in person or at their said residence in Kentucky or at their said place of business in Kentucky on the day of the maturity of said bill nor at any time; that there was no agreement to pay said bill in New York except as shown on the face of said bill; that at the time of the execution of said bill and its maturity the post-office address of each of said defendants, Merritt Cox and J. D. Clardy, was Newstead, Kentucky, and had so been for five years previously, and not Hopkinsville, Kentucky; that the original bill of which the one in suit was a renewal was at the time of renewal held by the plaintiff; that it was sent as aforesaid to G. V. Thompson, of Hopkinsville, Kentucky, for the purpose of having it renewed; that at the time when the bill matured said Thompson was informed and knew that the post-office address of each of said defendants was Newstead, Ky., and not Hopkinsville, Kentucky; that mail
32 facilities between Hopkinsville, Ky., and New York, N. Y., were ample and daily; that a letter in course of transmission from one of said places to the other in the mail occupied and took about three days; that G. V. Thompson at the times aforesaid resided in Hopkinsville, Ky.; that there was at said times telegraphic communication between the said two cities; that said E. M. Wright & Co. were factors and commission merchants of New York City, N. Y., and in that capacity did business there for the said firm of Cox & Cowan, and in the course thereof said bill was received; that each of said firm of Cox & Cowan during the course of said business and up to June, 1875, on different occasions visited New York on business, and while there wrote letters and received letters at the office of E. M. Wright & Co., and looked after the business entrusted to the hands of their said factors, and did the like with other factors in their employment in said city at the same time.

And the plaintiffs, further to sustain the issues, on their behalf, introduced by competent witnesses before the jury facts tending to show that the said original bill was sent to G. V. Thompson by said E. M. Wright & Co.; that said Wright & Co. corresponded with said Thompson
33 in their own names, disclosing no sort of agency for the plaintiffs; that said Thompson procured the renewal of the bill at their request and by their instruction, and sent it to them when obtained; that he had no communication with the plaintiffs and was never at any time

in any respect their agent, and did not inform them nor said Wright & Co. of the post-office address of either of said defendants, and was not enquired of as to either, and thereafter Thompson never had the bill in his possession or any connection therewith.

Whereupon the court charged and instructed the jury as follows:

"The court instructs the jury that the bill of exchange sued on, being addressed to Cox & Cowan, New York, N. Y., is in law payable in the city of New York, notwithstanding the plaintiffs may have known at and before the making and acceptance and indorsement and maturity of the same that the acceptors, Cox & Cowan, each actually resided at Hopkinsville, Ky., and at each of said times."

And to the giving of this instruction the said defendants and each of them then and there in the presence of the jury objected and excepted.

And the court further instructed the jury: "That if they believed from the evidence that the notary intrusted with said bill of exchange on the day of the maturity thereof made reasonable and diligent inquiry for the acceptors and their place of business in New York City, at the place or places frequented by them when in said city, and could not
34 after such inquiry find them or any place of business of them or either of them, and then demanded payment on the day of maturity in business hours at the place so frequented by them in the city of New York, then such a demand was a sufficient demand of payment." To this instruction and the giving of the same by the court each of said defendants then and there in the presence of the jury excepted.

The court further instructed the jury:

"That if the plaintiff at the time of the protest of said bill of exchange did not know the post-office addresses of the drawer, Merritt Cox, and the indorser, J. D. Clardy, and the notary protesting the bill did at the time of protesting make inquiry as to their several post-office addresses of E. M. Wright & Co., who had assigned the bill to plaintiff and who were the correspondents of the acceptors, and who in the judgment of the notary were likely to be informed as to such post-office addresses, and who professed to know them, and did inform the notary what the said post-office addresses were, to wit, Hopkinsville, Ky., and on the day next after the making of said protest the notary did transmit by mail, post paid, to the drawer and endorser notices of said protest addressed to each at his post-office as by the notary so ascertained, such notice of protest is good to bind the drawer and endorser."

35 To this instruction and to the giving of the same by the court each of said defendants then and there in the presence of the jury excepted. And the said defendants, Merritt Cox & J. D. Clardy, each asked and moved the court to instruct the jury as follows:

No. 1. On motion of the counsel for the defendants, Merritt Cox and J. D. Clardy, the court instructed the jury if they believe from the testimony that the bill in suit was given in renewal of one by the same parties, and of like tenor and amount, held by the plaintiffs, and was drawn and accepted in Hopkinsville, Kentucky, and there indorsed by J. D. Clardy, the payee, and delivered to G. V. Thompson as agent for the holders; and if they believe also that the plaintiffs were at the time the holders, then the plaintiffs are chargeable with knowledge of such facts in regard to the post-office address of each of said defendants as the jury may believe from the evidence were then known to the said Thompson, and which might have been ascertained by the plaintiff from an enquiry.

The court said this instruction is refused, because there is no evidence tending to show that Thompson was at any time or in anything agent

of the plaintiffs, or that he had any connection with the bill except to procure its renewal at the request of Wright & Co.

No. 2. On motion of counsel for the defendants, Merritt Cox & J. D. Clardy, the court instructs the jury that the term place of business
36 in reference to the acceptors of the bill in suit means only the regular settled place of business of the said acceptors or one of them, and not the merely casual and temporary use of the house of another person away from the homes of the said acceptors. The jury would not be authorized to find that the house of Edward M. Wright & Co., of New York, New York, was the place of business of said acceptors or of either of them, unless they believe from the evidence that the said acceptors or one of them at least regularly and permanently transacted business there, and not merely occasionally when absent from home.

The court, in refusing the instruction, said it was abstract; that however correct the definition of place of business might be, to give such a definition to the jury in this case would tend only to mislead them.

No. 3. On motion of counsel for the defendants, Merritt Cox & J. D. Clardy, the courts instructs the jury that the acceptance of Cox & Cowan of the bill of exchange here in suit was a general acceptance, which made the said bill payable at no particular place, and that in order to charge the said defendants in this action it is necessary that the plaintiffs should show by proof to the satisfaction of the jury that they on the day of the maturity of said bill, allowing three days of grace, caused the said bill to be presented for payment to said Cox & Cowan, or to one of them, in person, or caused the said bill to be presented at the residence
37 of said Cox & Cowan, or at the residence of one of them, or caused the said bill to be presented at the place of business of the said Cox & Cowan, or at the place of business of one of them, and that such presentment was accompanied by a request for the payment of said bill.

No. 4. On motion of the defendants, Merritt Cox & J. D. Clardy, by their counsel, the court instructs the jury that if they believe from the evidence that the plaintiffs at the maturity of said bill, and also at the time of the execution and delivery, had information of the residence and place of business of the said acceptors, and each of them, and that said residence and place of business were in Hopkinsville, Christian County, Kentucky, then in order to charge the said defendants in this action the plaintiffs must show a presentment of said bill for payment and a demand of payment of the same on the day of its maturity, allowing three days' grace, to and upon the said acceptors or to and upon one of them in person, or else a presentment of said bill for payment and a demand of payment of the same at the residence or place of business of said acceptors or at the residence or place of business of one of them.

No. 5. On motion of counsel for the defendants, Merritt Cox and J. D. Clardy, the court instructs the jury that if they believe from the testimony that the plaintiffs made no effort until the 25th or 26th day
38 of October, 1875, to learn of the post-office address of said defendants, and then only made inquiry on one of those days in New York City, New York, of one person resident there, the plaintiffs did not use such diligence as they should have used to ascertain such post-office address, and if by reason of such lack of diligence they failed to ascertain the post-office address of said Cox & Clardy, then the jury should find for said defendants, unless they further believe from the testimony that the notary, J. L. Slosson, mailed the notice of protest of said bill to said defendants at their actual & proper post-office.

The court, in refusing this instruction, said there could be no necessity

of making inquiry of more than one person if that person was likely to know, and actually professed to know, the residence of the respective parties.

The court, acting on each separately, refused to give each and all of said instructions so moved and asked for by the said defendants as above set forth; and to the refusal of the court to give each and all of said above set out instructions so asked by them, the said defendants, and each of them, then and there, in the presence of the jury, excepted, and so excepted to the refusal of the court to give each of said instructions.

But the court, after refusing the said instruction marked No. 1, above set forth, and asked for by the said defendants, instructed the
39 jury as follows:

"If the jury believe from the testimony that the original bill was pledged to the plaintiffs by E. M. Wright & Co., and that they at the maturity thereof delivered the same to E. M. Wright & Co. for renewal, and that the latter sent the same to G. V. Thompson, of Hopkinsville, Ky., who after procuring such renewal sent the bill in suit to said Wright & Co., and that Thompson had no other connection with said bill, then the plaintiffs are not chargeable with the knowledge had by said Thompson of the post-office address of the said drawer & endorser of said bill."

To the giving of this instruction by the court each of said defendants, Merritt Cox & J. D. Clardy, then and there in the presence of the jury excepted and objected.

And because these matters do not sufficiently appear of record, the said two defendants pray that this their bill of exceptions may be signed and sealed and made of record, which is accordingly done.

December 13, '76.

[SEAL.] BLAND BALLARD.

Thereupon came W. F. Cox and Wm. Cowan, by Walter Evans, their attorney, and stated in open court that they had no defense in this case, and that they would not join in the suing out of any writ of error upon judgment in this case, and it is ordered that the defendants, Merritt Cox and J. D. Clardy, be allowed to prosecute a writ of error herein without joining the said W. F. Cox & William Cowan, or either of them.

40 And on another day of said term of our said court, to wit, on Thursday, February 1st, 1877, came the defendants, J. D. Clardy & Merritt Cox, by Walter Evans, their attorney, and tendered their appeal bond herein, which is approved and filed.

The appeal bond is as follows, to wit:

Appeal bond.

Circuit court of the United States, sixth circuit and district of Kentucky.

MERRITT COX & J. D. CLARDY, PLAINTIFFS in error,
against
THE NATIONAL BANK OF THE STATE OF NEW York, defendants in error.

Know all men by these presents that we, Merritt Cox and J. D. Clardy,

and B. B. Nance, their surety, are held and firmly bound unto the above-named National Bank of the State of New York, in the sum of ten thousand dollars, to be paid to the said National Bank of the State of New York, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly, by these presents,
41 sealed with our seals, and dated this 13th day of January, A. D. 1877.

Whereas the above-named Merritt Cox & J. D. Clardy hath prosecuted a writ of error to the Supreme Court of the United States for the sixth circuit and district of Kentucky, to reverse the judgment rendered in the circuit court of the United States for the district of Kentucky, sitting at Louisville, against the said Merritt Cox & J. D. Clardy, in the case of the National Bank of the State of New York against Merritt Cox, Cox and Cowan, & J. D. Clardy:

Now, therefore, the condition of this obligation is such, that if the above-named Merritt Cox & J. D. Clardy shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

J. D. CLARDY. [L. S.]
MERRITT COX. [L. S.]
B. B. NANCE. [L. S.]

Taken and acknowledged before me this 13th day of January, A. D. 1877.

J. I. LANDES,
Com'r of U. S. Cir. Court for Ky. District, Christian County.

42 DISTRICT OF KENTUCKY:

I, Samuel B. Crail, clerk of the circuit court of the United States for the Kentucky district, at Louisville, do certify that the foregoing forty-one pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

In testimony whereof witness my signature and the seal of said court, at Louisville, this 21st day of September, A. D. 1877.

[SEAL.] SAM'L B. CRAIL, *Clerk.*

43 UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between the National Bank of the State of New York, plaintiffs, and W. F. Cox, Wm. Cowan, Merritt Cox, and J. D. Clardy, defendants, a manifest error hath happened, to the great damage of the said Merritt Cox and J. D. Clardy, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of our next October term in the

said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this 15th day of December, A. D. 1876, and of the Independence of the United States the 101st.

[SEAL.] SAM'L B. CRAIL, *C. C. C. K. D.*

Allowed by BLAND BALLARD.

44 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To the National Bank of the State of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the 1st day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein Merritt Cox and J. D. Clardy are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of February, in the year of our Lord 1877 and of our Independence the 101.

BLAND BALLARD.

Affiant, Walter Evans, states that he served the above citation this 1st day of February, 1877, by delivering a true copy thereof to W. F. Barrett & John Mason Brown, counsel of record for the National Bank of the State of New York in this action.

WALTER EVANS.

Sworn to this 1st day of February, 1877, by Walter Evans.

SAML. B. CRAIL,
Clerk Cir. Ct. K. D.,
By HENRY F. CASSIN, *D. C.*

The undersigned, counsel of record for the above-named defendants in error, acknowledge and accept service of the above citation this February 1st, 1877.

BARRETT & BROWN, *Att'y.*

45 *Assignment of errors.*

Supreme Court of the United States, October term, in the year of our Lord, 1877.

J. D. CLARDY AND MERRITT COX, PLAINTIFFS in error,
vs.
THE NATIONAL BANK OF THE STATE OF NEW York, defendants in error.

Afterwards, to wit, on the first Monday in October, in the same year, before the justices of the Supreme Court of the United States, at the

Capitol, in the city of Washington, comes the said J. D. Clardy & Merritt Cox, by Walter Evans, their attorney, and say that in the record and proceedings aforesaid in said cause there is manifest error in this, to wit:

1st. That the petition of the defendants in error aforesaid, and the matters therein contained, are not sufficient in law for the said National Bank of the State of New York to have or maintain its aforesaid action thereof against the said J. D. Clardy and Merritt Cox, or either of them.

2d. There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said bank and against the said Clardy & Cox, whereas, by the law of the land, the said judgment ought to have been given for the said Clardy & Cox, and against the said national bank.

46 3rd. There is also error in this, to wit, that each and every part of the instructions given to the jury by the court on the trial of said action, as appears by the record, was contrary to the law of the land.

4th. And there is also error in this, to wit, that the refusal of the court to instruct the jury on the trial of the cause in said circuit court, as moved for by the said J. D. Clardy & Merritt Cox, and as appears from the record, was, as to each instruction so moved, contrary to law.

Prayer for reversal.

And the said J. D. Clardy and Merritt Cox pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

WALTER EVANS,
Attorney for J. D. Clardy and Merritt Cox.

(Indorsement on cover:) No. 184. Merritt Cox and J. D. Clardy, plaintiffs in error, vs. The National Bank of the State of New York. Kentucky C. C. U. S. Filed 25th September, 1877.

Supreme Court of the United States

OCTOBER TERM, 1879.

MERRITT COX ADN J. C. WHITLOCK, ... Plaintiffs in Error,

Versus } No. 183.

NATIONAL BANK OF THE STATE OF NEW YORK, . . . Defendant,

AND

MERRITT COX AND J. D. CLARDY, ... Plaintiffs in Error,

Versus } No. 184.

THE SAME DEFENDANT.

WALTER EVANS, Counsel for the Plaintiffs in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1879.

MERRITT COX AND J. C. WHITLOCK, PLAINTIFFS IN ERROR,

VERSUS } No. 183.

NATIONAL BANK OF THE STATE OF NEW YORK, DEFENDANT.

AND

MERRITT COX AND J. D. CLARDY, PLAINTIFFS IN ERROR,

VERSUS } No. 184.

THE SAME DEFENDANT.

These two cases present substantially the same issues, and it has been stipulated that an order shall be entered requiring them to be argued together. Anticipating that order, counsel for the plaintiffs proceeds accordingly.

STATEMENT OF THE CASES.

No. 183.

This is an action at law brought by the defendant in error against the drawer, indorser, and acceptors of a bill of exchange

made for the accommodation of the acceptors of the following tenor (Record, p. 3):

$5,000. HOPKINSVILLE, KY., August 3, 1875.

Eighty days after date pay to the order of J. C. Whitlock five thousand dollars, value received, and charge to account, renewing a bill for same amount and names, due August 3, 1875.

MERRITT COX.

To Messrs. COX & COWAN, New York, N. Y.

The drawees wrote across the face of the bill only these words: "Accepted: Cox & Cowan."

The payee, Whitlock, indorsed the bill to E. M. Wright & Co., of New York, who, in turn, indorsed it to the bank.

The bank in suing upon this bill alleged that on the day of its maturity it was placed in the hands of a notary public in the city of New York, N. Y., and he, on that day, presented the bill at various places in said city, and made diligent and careful search for the acceptors and their place of business in said city of New York, but could not find either of said acceptors, or any place of business of them or either of them in said city, except only the office of E. M. Wright & Co.; and said notary thereupon presented the bill at said office and demanded payment thereof there, which was refused, and he thereupon protested said bill, of all of which the defendants in said suit had due notice.

The acceptors made no defense, but Merritt Cox, the drawer, and J. C. Whitlock, the indorser, answer separately, and deny that they were ever notified of said protest or of the dishonor of said bill in any way whatever, and they also deny that the post-office address of either of them was Hopkinsville, Ky., to which place the notary addressed the notices. They assert that the post-office of each is Newstead, Christian County, Ky., and not elsewhere, and has been so exclusively and continuously for fifteen years.

They also allege that the bill was drawn by Merritt Cox,

accepted by Cox & Cowan, and indorsed by Whitlock, and delivered in Hopkinsville, Christian County, Kentucky; that all of said parties resided in Hopkinsville or in Christian County, Kentucky; that the place of business of Cox & Cowan was likewise at Hopkinsville, *and was never elsewhere;* and that *the bank knew all these facts when it took the bill and when it matured.*

That the bank was the holder of the original bill, of which this was a renewal, and had held this bill ever since it was executed. (See amended answer, page 11.)

They each assert that the bill was in terms payable at no particular place, other than the residence or place of business of the acceptors, viz. Hopkinsville, Ky.

That no demand of payment was made at the maturity of said bill, either upon the acceptors, or either of them in person or at the residence or place of business of either or both of them, but that, on the contrary, the bank, though well knowing the place of business and residence of Cox & Cowan, utterly failed and neglected to make any demand whatever of payment of said bill of or upon the acceptors or either of them. They each deny that Cox & Cowan had at any time a residence or place of business outside of Kentucky.

They deny that the notary public made diligent search for Cox & Cowan in New York, and allege that the bank then had knowledge, and so had E. M. Wright & Co., that Cox & Cowan resided in Kentucky, and had their place of business there, and had so known when the bill was drawn.

They deny that the office of E. M. Wright & Co. was ever the office or place of business of Cox & Cowan, or of either of them.

We know not how to state the facts more "succinctly" than substantially to copy that portion of the short bill of exceptions which gives the evidence.

The bank, after reading the bill of exchange and the protest thereof, offered in evidence facts tending to show that the notary intrusted with said bill made reasonable and diligent inquiry for the acceptors and their place of business in New York City, at

the place or places frequented by them when there, and could not, after such inquiry, find them or any place of business of them or either of them, and then demanded payment on the day of maturity in business hours at the place so frequented by them when in said city, and that payment of said bill was then and there refused; that they caused inquiry to be made by the said notary in New York on the 25th or 26th day of October, 1875, of E. M. Wright, a resident of New York City, and one of the firm of E. M. Wright & Co., who indorsed said bill to the bank, as to the post-office address respectively of said Merritt Cox and J. C. Whitlock, and that said notary was then informed by said Wright that the post-office address of each of said defendants was Hopkinsville, Ky.; and that said notary on the 26th day of October, 1875, mailed notices of said protest to each of said defendants at Hopkinsville, Ky., and there was no evidence to show that the bank, or any one for it, at any time made any other inquiries for the post-office address of either or both of said defendants.

Said Cox & Whitlock proved facts tending to show that the bill was drawn by Merritt Cox, accepted by Cox & Cowan, and indorsed by Whitlock, all in Hopkinsville, Ky., and it was there delivered to G. V. Thompson, to whom the bill, of which the one in suit was a renewal, had been sent by E. M. Wright & Co., who had indorsed the same to the bank as collateral security and *had received it after maturity from the bank* (*the holder*) *for the purpose of having it renewed;* that Thompson sent the bill in suit to said Wright & Co., who immediately delivered it to the bank and informed it that the bill had been executed and accepted in Kentucky; that at the time of the execution and acceptance of said bill, and at the time of its maturity, the acceptors thereof, W. F. Cox and Wm. Cowan, composing the firm of Cox & Cowan, each resided in Hopkinsville, Christian County, Ky., and had their place of business there, and not elsewhere; that the bank, when they took said bill, and when it was executed and when it matured were informed and had knowledge that the residence and place of business of Cox & Cowan

were at Hopkinsville, Ky., at all the times aforesaid; that there was no presentment for payment of said bill nor demand of payment of same to or upon said acceptors, or either of them, in person or at their residence or place of business in Kentucky on the day of its maturity, or at any time; that there was no agreement to pay said bill in New York except as shown upon its face; that the post-office address of both Merritt Cox and J. C. Whitlock was then and at all previous times for fifteen years had been Newstead, Ky., and never at Hopkinsville, and that at all times when the bill in suit or the previous one existed G. V. Thompson, to whom the bill had been sent, resided in Hopkinsville, Ky., and well knew the post-office address of both Cox and Whitlock to be Newstead, Ky., and not Hopkinsville; that mail facilities between Hopkinsville and New York were ample and daily, and that a letter reached one place from the other in three days; that there was telegraphic communication between the two places; that E. M. Wright & Co. were factors and commission merchants in New York, and in that capacity did business for Cox & Cowan, and in the course thereof the bill was received; that each of the firm of Cox & Cowan during the course of said business, and up to June, 1875, on different occasions visited New York on business, and while there wrote and received letters at the office of said Wright & Co. and looked after business intrusted with said factors and did the like with other factors in their employment in said city.

The bank's proof also tended to show that the said original bill was sent to G. V. Thompson by said E. M. Wright & Co., who corresponded with said Thompson in their own names, disclosing no sort of agency for the bank; that said Thompson procured the renewal of said bill at their (Wright & Co.'s) instance and by their instruction, and sent it to them when obtained; that he had no communication with the bank, and was never at any time in any respect its agent, and did not inform it nor said Wright & Co. of the post-office address of Merritt Cox or Whitlock, and was not inquired of as to either, and afterward had no further connection with the bill.

No. 184.

In this case there is a substantial identity of facts with those in Case No. 183; J. D. Clardy in *this* occupying precisely the position of J. D. Whitlock in *that.*

In each case the following questions are presented by the instructions:

1. Whether the two bills of exchange were made *payable* in New York, N. Y., merely by being *addressed* to Cox & Cowan there?

2. Whether the acceptance of each bill was not a general one, which made it *payable* at the residence or place of business of the acceptors; and, upon the facts shown in these cases, should not demand of payment have been made either upon the acceptors in person, or at their dwelling or place of business in Kentucky?

3. Whether the bank, knowing, as it did, when the bill was drawn and accepted, that that was done in Kentucky and that the acceptors had their residence and place of business in Hopkinsville, Ky., and not elsewhere, was not bound, in the exercise of due diligence, to demand payment of the bills *there*, either upon the acceptors (who were there) in person or at their residence or place of business?

4. Whether the failure of the bank to make inquiry as to the post-office address of the plaintiffs until the maturity of the bills or the day afterward (Record, p. 12) was not such negligence as released the plaintiffs, no notice in fact being shown?

5. Even if this be not so as to Merritt Cox, who dated the bills, is it not clearly so as to both J. C. Whitlock and J. D. Clardy, who are simply indorsers?

6. Was it not requisite, in order to bind the plaintiffs in error, that the *bank should show* that the notices were put into the post-office *in time to go by the mail* of the 26th of October, 1875, and not merely that they were put into the post-office *on* the 26th?

7. G. V. Thompson perfectly well knew the post-office address of each of the plaintiffs in error. Is not this knowledge imputable to the bank?

ASSIGNMENT OF ERRORS.

First Error.

There was error in each case in the following instruction given to the jury (Record, p. 14): "The court instructs the jury that the bill of exchange sued on, being addressed to Cox & Cowan, New York, N. Y., is in law, payable in the city of New York, notwithstanding the plaintiff may have known at and before the making and acceptance and indorsement and maturity of the same, that the acceptors, Cox & Cowan, each actually resided at Hopkinsville, Ky., at each of said times."

Second Error.

There was error in the refusal of the court to instruct the jury, as moved by the plaintiffs in error, as follows (Record, page 15), viz: "No. 3. On motion of counsel for defendants, Merritt Cox and J. C. Whitlock, the court instructs the jury that the acceptance of Cox & Cowan of the bill of exchange herein sent was a general acceptance, which made the said bill payable at no particular place; and that in order to charge the said defendants in this action it is necessary that the plaintiffs should show by proof to the satisfaction of the jury that they, on the day of the maturity of said bill, allowing three days of grace, caused the said bill to be presented for payment to said Cox & Cowan, or to one of them in person, or caused the said bill to be presented at the residence of said Cox & Cowan or at the residence of one of them, or caused the said bill to be presented at the place of business of the said Cox & Cowan, or at the place of business of one of them; and that such presentment was accompanied by a request for the payment of said bill."

A similar instruction was erroneously refused in No. 184.

Third Error.

The court erred in refusing to instruct the jury as follows (Record, p. 15), viz: "No. 4. On motion of the defendants, Mer-

ritt Cox and J. C. Whitlock, by their counsel, the court instructs the jury that if they believe from the evidence that the plaintiffs, at the maturity of said bill and also at the time of its execution and delivery, had information of the residence and place of business of the said acceptors and of each of them, and that said residence and place of business were in Hopkinsville, Christian County, Ky., then in order to charge the said defendants in this action, the plaintiffs must show a presentment of said bill for payment and a demand of payment of the same on the day of its maturity, allowing three days of grace, to and upon the said acceptors, or to and upon one of them in person, or else a presentment of said bill for payment and a demand of payment of the same at the residence or place of business of said acceptors, or at the residence or place of business of one of them."

A similar instruction was prayed in case No. 184, which was also erroneously refused.

Fourth Error.

In each case the court below erroneously instructed the jury as follows (Record, p. 14), viz: "That if they believed from the evidence that the notary intrusted with said bill of exchange, on the day of the maturity thereof, *made reasonable* and *diligent inquiry* for the acceptors and their place of business in New York at the place or places frequented by them when in said city, and could not, after such inquiry, find them or any place of business of them or either of them, and then demanded payment on the day of maturity in business hours at the place so frequented by them in the city of New York, then such a demand was a sufficient demand of payment."

Fifth Error.

The court refused to give the following instruction, and also refused to give a similar one in No. 184 (Record, p. 15). This was error. "No. 2. On motion of counsel for the defendants,

Merritt Cox and J. C. Whitlock, the court instructs the jury that the term 'place of business,' in reference to the acceptance of the bill in suit, means only the regular, settled place of business of the said acceptors or one of them, and not merely the casual and temporary use of the house of another person away from the home of the said acceptors. The jury would not be authorized to find that the house of Edward M. Wright & Co., of New York, N. Y., was the place of business of said acceptors or one of them, unless they believe from the evidence that the said acceptors, or one of them at least, regularly and permanently transacted business there, and not merely occasionally, when absent from home."

SIXTH ERROR.

The court erred in instructing the jury as follows (Record, p. 14), viz: "That if the plaintiffs at the time of the protest of said bill of exchange did not know the post-office address of Merritt Cox, the drawer, and J. C. Whitlock, the indorser, and the notary protesting said bill did, at the time of such protesting, make inquiry as to their several post-office addresses of E. M. Wright & Co., who had assigned the bill to plaintiff, and who were the correspondents of the acceptors, and who in the judgment of the notary were likely to be informed of such post-office addresses and who professed to know them, and did inform the notary what the said addresses were, to wit, Hopkinsville, Ky., and on the day next after the making of said protest the notary did transmit by mail, post paid, to the drawer and indorser notices of said protest addressed to each at his post-office, as by the notary so ascertained, such notice of protest is good to bind the drawer and indorser."

In No. 184 a similar instruction was also erroneously given.

SEVENTH ERROR.

The court erroneously refused to grant the following instruction (Record, pp. 14, 15). A similar one was also erro-

neously refused in No. 184, viz: "No. 1. On motion of the counsel for the defendants, Merritt Cox and J. C. Whitlock, the court instructs the jury that if they believe from the testimony that the bill in suit was given in renewal of one by the same parties and of like tenor and amount held by the plaintiffs, and was drawn and accepted in Hopkinsville, Ky., and there indorsed by J. C. Whitlock, the payee, and delivered to G. V. Thompson as agent of the holders, and if they believe also that the plaintiffs were at the time the holders, then the plaintiffs are chargeable with knowledge of such facts in regard to the post-office addresses of each of said defendants as the jury may believe from the evidence were then known to the said Thompson and which might have been ascertained from him on inquiry."

Eighth Error.

The court erred in each case in giving the following instruction (Record, p. 16), viz: "If the jury believe from the testimony that the original bill was pledged to the plaintiffs by E. M. Wright & Co., and that they at the maturity thereof delivered the same to E. M. Wright & Co. for renewal, and the latter sent the same to G. V. Thompson at Hopkinsville, Ky., who, after procuring such renewal, sent the bill in suit to said Wright & Co., and that Thompson had no other connection with said bill, then the plaintiffs are not chargeable with the knowledge had by said Thompson of the post-office addresses of the said drawer and indorser of said bill."

Ninth Error.

The court erred in each case in refusing an instruction similar to the following (Record, pp. 15–16), viz: "No. 5. On motion of counsel for the defendants, Merritt Cox and J. C. Whitlock, the court instructs the jury, if they believe, from the testimony, that the plaintiffs made no effort until the 25th or 26th day of October, 1875, to learn the post-office address of said defend-

ants, and then made inquiry on one of those days in New York City, N. Y., of one person resident there, the plaintiffs did not use such diligence as they should have used to ascertain such post-office address; and if, by reason of such lack of diligence, they failed to ascertain the post-office address of said Cox and Whitlock, then the jury should find for the defendants, unless they further believe, from the testimony, that the notary, J. L. Slosson, mailed the notice of protest of said bill to said defendants at their actual and proper post-office."

This refusal of the court was erroneous as to each of the plaintiffs in error. *It was*, we think, *certainly erroneous as to the indorsers, J. C. Whitlock and J. D. Clardy.*

POINTS AND AUTHORITIES.

I.

The bill of exchange, being addressed to Cox & Cowan, New York, N. Y., is not THEREFORE and at all events *payable* there, and it was error for the court to so instruct the jury. (Record, p. 14.)

Rowe v. Young, 2 Brod. & Bing. 276; Fenton v. Goundry, 13 East. 468; Chitty on Bills, star page 172;* Lighter v. Will, 2 Watts & Ser. 140; Fisher v. Evans, 5 Binney, 541.

II.

The acceptors never had a residence or place of business in New York. On the contrary, they lived in Hopkinsville, Ky., and did business there, and there the bill was executed and delivered. They at no time *changed* their residence or place of business. *All these facts were known to the bank when it took the bill and before its date and when it matured.* Hence, in the exercise of the diligence necessary to bind the drawer and in-

*9th Am. Ed.; page 151, 10th Ed.

dorser, it was absolutely essential that presentment for payment should, at maturity, have been made in Kentucky.

Taylor v. Snyder, 3 Denio, 145; Spies v. Gilmore, 1 Comstock, 321; Bank of Orleans v. Whittemore, 12 Gray, 469; 1 Parsons, Bills and Notes, 453; In re Glyn, 15 Nat. Bank Reg. 502, 503; Fisher v. Evans, 5 Binney, 542.

III.

Diligence in making demand is essential. It can not be due diligence to make presentment of a bill in New York which is not payable there, and the holder of which knows will not be paid there—the acceptors, to his knowledge, residing and doing business in another state.

IV.

The bills here in suit, having mentioned on them no place of payment, were, whether they be foreign or inland bills, in legal contemplation *payable* at the residence or place of business of the acceptors, and demand of payment should have been made there at the maturity of the bills.

Musson v. Lake, 4 How. 274; Whitesides v. Northern Bank, 10 Bush, 502; Barnes v. Vaughan, 6 Rhode Island, 259; Story on Bills, last clause, sec. 325; 1 Parsons on Bills and Notes, 421–5, 441.

V.

The address of the drawee on a bill of exchange is nothing more than an intimation of where he is, or of where he resides or does business. It is perhaps *prima facie* his residence.

Rowe v. Young, 2 Brod. and Bing. 276; Fenton v. Goundry, 13 East. 468; Chitty on Bills, star page 172, 9th ed.; page 151, 10th ed.; Lowry v. Scott, 24 Wendell, 358.

If the holder is misled by the address and does not know to the contrary, of course he is excusable for only making demand at the place of address. He may, in short, assume it to be the acceptor's residence unless he knows to the contrary.

If in fact the acceptor, when the bill was made and delivered, *resided* at the place of address, the holder may present it there, notwithstanding his removal; at all events the holder may do so unless he knows of the removal in time to make the demand at the acceptor's new home.

VI.

The second instruction given by the court below (Record, page 14) was erroneous: 1. Because it assumes that in any event demand of payment of the bills could legally have been made in New York when the holder knew the acceptors were not there in person, and had at no time had a residence or place of business there; even though the court did this upon the assumption that the bills were *per se* payable in New York because *addressed* to the drawees there.

2. Because the court *left it to the jury* to decide whether the notary "*made reasonable and diligent inquiry*" *for the acceptors.*

Indeed, as the holder *knew* the acceptors were not to be found in New York, the act of inquiring for them there was quite supererogatory.

The jury were not the tribunal to decide the legal question of "reasonable and diligent inquiry."

VII.

The court should have given the instruction (Record, page 15) which defined the phrase "place of business." *Not doing so* may have induced the jury to regard the presentment actually made as good upon the idea that E. M. Wright & Co.'s office was sufficiently the "*place of business*" of Cox & Cowan to authorize a demand there.

Sussex Bank v. Baldwin, 2 Harrison, 487.

VIII.

The third instruction given by the court below (Record, page 14) was wrong, because it made the action of the notary sufficient in mailing the notices *on* the 26th day of October, 1875, the day after the protest. The law of this court would seem clearly to be that the holder *must show* that the notices were mailed in time *to go* by the mail of the next day.

Lenox v. Roberts, 2 Wheaton, 377; Dickens v. Beal, 10 Peters, 581.

This instruction is also erroneous, because it assumes abstractly and without a word in the proof to justify the assumption that the notices when mailed were "*post paid.*"

IX.

It was a lack of due diligence for the holder to wait until the very day of maturity, or the next day, to make inquiry as to the post-office address of the drawer and indorser. The holder should have been prepared with this information in advance, and especially should inquiry have been made as to the *indorsers.*

Hill v. Varrill, 3 Greenleaf, 233; 2 Daniel Nego. Ins. 74; 1 Parson's Bills and Notes, 493, in note; Lowry v. Scott, 24 Wendell, 358; Spencer v. The Bank, 3 Hill, 520.

X.

It would seem clear from the facts stated in the bill of exceptions (original p. 30, printed Record, p. 13) that the bank delivered the original bills to E. M. Wright & Co. in New York, for the purpose of renewal, and that the bank then knew the other parties were all in Kentucky.

We maintain therefore

1. That it was never contemplated that E. M. Wright & Co.

should do otherwise than transmit the bills to some person in Kentucky as they did to G. V. Thompson.

2. That E. M. Wright & Co. were authorized to do this by the necessities of the case.

3. That Thompson was therefore, in legal contemplation, the agent of the bank whether the bank ever heard of him or not.

4. That if Thompson had failed in his duty the bank alone could have sued for the default.

5. Thompson's individual knowledge of the post-office address of the plaintiffs in error is clearly imputable to the bank.

6. As the notices were not addressed to the proper post-office, and were never, in fact, received, they were not good.

The instructions of the court contrary to these views were erroneous. The jury should have been instructed as prayed by the plaintiffs in error. (Record, p. 14.)

Story on Agency, secs. 14, 201, 217 *a*; Bank of Washington v. Triplett, 1 Peters, 30; Dorch. & Milt. Bank v. New England Bank, 1 Cushing, 177.

XI.

Though drawn so as to appear to be foreign bills, and though they might have been treated as such by one not knowing to the contrary, yet as they were drawn in Kentucky by parties resident there on persons who likewise resided there, they are inland bills, and the bank knowing all these facts can not treat them otherwise.

Story on Bills, sec. 24.

XII.

Being inland bills, and so to be regarded in the hands of the bank, which knew all the facts, they are, if possible, more nearly assimilated to simple negotiable notes, and the cases of Taylor v. Snyder, Spies v. Gilmore, Bank of Orleans v. Whittemore, and *in re* Glyn seem to be perfectly conclusive.

While a protest was unnecessary, demand of payment and notice were quite as essential as in case of a foreign bill.

Hager v. Boswell, 4 J. J. Mar. 62.

ARGUMENT.

There are certain well-settled principles which have relation to the liability of drawers and indorsers of bills of exchange, which it may be well to state *in limine*, as throwing light on the questions we discuss.

1. The drawer and indorser of a bill of exchange wherever payable, each undertakes that the drawee will pay it if the holder present it to him at maturity, and demand payment; and if he refuse to pay it and the holder cause it to be protested, and due notice be given to them, they severally promise to pay it. *All these conditions* enter into and *make part of the contract* between the parties to a foreign bill of exchange, and the law imposes the performance of them upon the holder as *conditions precedent* to their liability upon the bill.

Musson v. Lake, 4 Howard, 274.

2. Special places of payment are always fixed, if at all, by agreement, and while it may be by parol, is ordinarily expressed in the bill.

Wallace v. McConnell, 13 Peters, 150.

In the absence of this special agreement the bill is *always payable* at the residence or place of business of the acceptor.

See authorities to Point IV.

3. The burden is on the holder *to show* that he did all that was necessary to fix the liability of those contingently liable on the bill.

2 Daniel on Neg. Ins., secs. 1050, 1051.

4. Demand of payment must be made on the very day of maturity. Rules of great strictness have been introduced by

the commercial law requiring the exercise of diligence in complying with all the conditions necessary to fix the liability of drawers and indorsers.

Story on Bills, sec. 325.

And the courts have often lamented that on the plea of hardship or the cry of technicality they have relaxed any of those rules.

See Ray v. Smith, 17 Wallace, 415.

5. The liability of a maker of a note is exactly equivalent to that of the acceptor of a bill.

13 Peters, 146; 2 Wheaton, 388; Byles on Bills, star page 153.

In legal effect, then, an accepted bill is the same as a negotiable note, and the legal predicament of the drawer and indorser of a bill is precisely that of an indorser of a note. Their liability depends upon the same rules every where that the statute of Anne is followed, which places negotiable notes on the footing of bills of exchange. This is the case in New York and in Massachusetts, whose decisions we cite further along.

6. An acceptance of a bill is only the acceptor's promise to pay according *to the tenor of the acceptance.*

Story on Bills, sections 113, 238, 252; 1 Parsons on Bills and Notes, 281; Hoffman v. The Bank, 12 Wallace, 186.

Per se, it designates no special place of payment, and if none is otherwise designated, the rule of law is left in full operation that the *place of payment is the acceptor's residence or place of business*, wholly irrespective of whether the bill is foreign or domestic.

7. The date of a bill affords some presumption, but only slight, that the *drawer* lives at the place where dated, but none that an *indorser* does.

2 Daniel on Neg. Ins. 74; 1 Parsons on Bills and Notes, 493 in note; Lowry v. Scott, 24 Wendell, 358; Spencer v. The Bank, 3 Hill, 520; Hartford Bank v. Green, 11 Iowa, 476; Anderson v. Drake, 14 Johnson, 116.

The questions arising on the

FIRST, SECOND, THIRD, AND FOURTH ERRORS

may be conveniently considered together.

The plaintiffs in error maintain the following propositions which, it seems to their counsel, are entirely clear upon the authorities and upon principle.

The address of a bill of exchange is not a direction to pay it at the place of the address, but only an indication of the whereabouts of the drawee or of his residence or place of business. (13 East. 468; 2 Brod. and Bing. 276; and see also 24 Wendell, 358.) The address has no other office. True, if the holder has no other information he may act upon the assumption that the address gives a correct indication, and the *drawer* may suffer if the holder thereby fail to make demand.

But due diligence to make demand upon the drawee or acceptor in person, or at his residence or place of business is, in general, absolutely essential in order to charge other parties to the bill.

And, though it may be due diligence to make the demand at the place of address *if* the holder knows no better, yet, if, as in these cases, the holder *certainly knows* that the address *is* a wrong indication, and, moreover knows where the residence and place of business actually are, it is indispensable that he should make demand at one or the other. The court below held that *address* of the bills *ex vi terminis* made New York, N. Y., the place of their *payment;* in other words, that this was thereby fixed as a part of the contract, wholly irrespective of the question of diligence.

It will be extremely difficult to find such a stipulation on the face of the paper or any thing resembling such a stipulation.

A sharp analysis of the bills will show that Merritt Cox directs Cox & Cowan to pay J. C. Whitlock (in one case, and J. D. Clardy in the other) the sum of $5,000. The legal import of the words "Accepted: Cox & Cowan" written on each bill is

an agreement of the acceptors to pay the $5,000 therein mentioned—nothing more.

No place of payment is named, and the legal result follows that the *place of payment* is the residence or business place of Cox & Cowan. There they are supposed to be ready to pay, and to undertake to do so.

It is, however, insisted that when Merritt Cox drew the bills he intimated on them that Cox & Cowan resided in New York, and therefore the bills were *payable* there. This can not be so as to the indorsers nor as to the drawer, unless it is equivalent to a direction to pay in New York, or a contract that the bills shall be paid there, nor can the address be construed to contain this stipulation unless, when every fair and logical ellipsis is supplied, it will so read.

Suppose the bills had been addressed "To Cox & Cowan, who are at, or who reside, or who have a place of business at New York, N. Y.," the full sense of the more elliptical expression actually employed would have been given, and really that is the exact meaning of the words used in the address.

Those words admit of *no other* or greater expansion, and it would give full expression to the purpose of the address, which is only used to give information and means of identification of the drawee.

It would seem impossible to conclude otherwise or to see in these words an agreement *to pay at any particular place, e. g.* New York, or at any other place than that which the law fixes, viz. the residence or place of business of the acceptor. It is possible and perhaps probable that Cox & Cowan were actually in New York when the old bills were drawn. The new ones were simply servile copies of the old.

To further illustrate: Suppose *to the words of the acceptances* there had been added by the holder, without the knowledge of the other parties to the bills, the simple words "New York, N. Y., August 3, 1875," would this have been a material alteration of the acceptance? Struthers v. Kendall, 5 Wright, 214, is a very strong case clearly answering in the negative.

But if the added words had been "*payable* at New York, N. Y., August 3, 1875," they would certainly have been material, and would have avoided the acceptance.

Whitesides v. Northern Bank, 10 Bush, 501; Bank of America v. Woodworth, 19 Johnson, 391.

Again: Suppose Cox & Cowan themselves had written the acceptances "Aug. 3, 1875, New York, N. Y. Accepted: Cox & Cowan," this dating would have been altogether as significant as the address, and would have meant the same thing the address meant; viz. that Cox & Cowan were then *in* New York. The cases of Taylor v. Snyder, Spies v. Gilmore, In re Glyn, and Bank of Orleans v. Whittemore would, in that event, apply with overwhelming force.

In Rowe v. Young, 2 Broderip & Bingham, 276 (6 E. C. L. 109), one of the judges (Abbott, C. J.) said, "A bill of exchange is ordinarily addressed to the drawee at his usual place of trade or residence, and it is to such a bill that I understand your lordship's question to refer; this address, however, is intended only as a direction to the payee or holder as to the place where the drawee may be found, in order that the bill may be presented to him for acceptance and payment, and not as a designation of a precise or definite house or place of payment."

In Fenton v. Goundry, 13 East. 468, Lord Ellenborough said, "For the information of the holders bills are generally directed to the drawees at their usual place of residence; but it is no part of the contract that the bill shall be presented there."

It has very often been decided that the fact that a note is dated at a certain place does not make it payable there.

The case of Hartford Bank v. Green et al., 11 Iowa, 476, is strong on this and on many other points of the cases now being heard.

See also Lighter v. Will, 2 W. & S. 140; Galpin v. Hord, 3 McCord, 541.

And Prof. Parsons in the first volume of his work on Bills and Notes says, at page 441, "The fact that a note is dated at

a certain place, it need hardly be necessary to remark, does not make the note specifically payable there."

See also Lowry v. Scott, 24 Wendell, 358.

We have already, we hope, shown that the mere *address* of the bill has, as to the acceptor, only the signification of *the date* of the bill to the drawer, or the date of the note to the maker.

If a place of payment is fixed in the body of the bill, as in Mitchell v. Baring, 10 B. & C. 4, and Gibbs v. Mather, 8 Bingham, of course that controls; and if these bills were payable in New York, we admit that the demand was well made.

Or, if the bank had been ignorant of the residence or place of business of the acceptors, the same result would follow; but as neither of these hypotheses is just, we rely very confidently on the general doctrine thus announced by Prof. Parsons (1 Bills and Notes, 453), and which seems most amply supported by the adjudications. He says: "Where the maker, at the time of signing the note, lives in another state from the one in which the note is dated and delivered, and in which the holder lives, a different question is presented. Where the party who receives a note under such circumstances *knows, when he takes it,* where the maker lives, and has sufficient time before the maturity of the note within which to cause a proper demand to be made upon the maker, it would seem to follow that he should be considered as taking the risk of a proper presentment in the state where the promisor resides. We think also that it follows, from the general principles relating to the contract of indorsement, that due diligence would require a demand at the place in which the maker lives."

True, this in terms relates to *notes;* but surely it can not be necessary to argue further that the predicament of the indorser of a note is, under the commercial law, the same as that of the indorser of a bill.* The adjudications supporting Prof. Parsons are especially strong.

In Taylor v. Snyder, 3 Denio, 146, the Supreme Court of New York held that where the maker of a note has a known residence when the note is given, which is not changed before it

*13 Peters, 146; 2 Wheat. 388.

becomes payable, a regular demand must be made, though the note is given and dated at a different place from his residence. This was so held in a case where the maker, who resided in Florida, made a note at Troy, N. Y. He dated it at Troy, but continued to reside in Florida until the note matured, all of which was known to the holder. Demand made at Troy was held not to have been due diligence.

This case was approved by the Court of Appeals of New York, in Spies v. Gilmore, 1 Comstock, 322, where the note was made, dated, and indorsed in the city of New York, but both the maker and indorser then resided at Matamoras, in Mexico, and continued to reside there when the note matured. These facts were all known to the holder.

The court held that presentment of the note to the maker *at Matamoras*, demand of payment from him, and notice to the indorser, were necessary to charge the indorser.

In Bank of Orleans v. Whittemore, 12 Gray, 469, the Supreme Judicial Court of Massachusetts announced the same doctrine. There the note was made and dated in Boston, but the maker resided in Texas, as was known to the holder's agent. The court on page 473 say: "And we hold that where the maker of a note, when it is made and indorsed, *has a known residence* out of the state, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of non-payment given to the indorsee before the indorser can be charged. So it is decided by the Court of Appeals in New York, in Taylor v. Snyder, before referred to, and in Spies v. Gilmore, 1 Comstock, 321."

In the matter of Glyn, 15 Bankruptcy Register, at pp. 502 and 503, Judge Lowell, in the course of an elaborate opinion said, "It is well settled that in order to hold the indorser of a note, not by its terms payable at any place, demand must be made upon the maker at his domicile; that the date of the note is presumptive evidence of the domicile, and, in Massachusetts at least, the date proves the domicile for the purpose of demand

and notice, unless the holder knows of some other, but if the holder knows the real domicile, payment must be demanded there."

The courts in these cases are careful to distinguish between them and cases where the *maker after* making a note removes to another state or country before it is due. But counsel for the plaintiffs in error confesses his inability to distinguish logically and upon principle between those cases in New York and Massachusetts and the cases he is arguing.

And if there is a reported case which conflicts with those cases (unless it is possible that some loose dicta unsupported by similar facts do so) it has eluded the search of counsel.

In the very brief argument of these questions allowed at the trial below, the only authority relied on by the learned counsel for the bank (so far as is now recalled) was the case of Buxton v. Jones, 1 Manning & Granger, 83, as cited by Mr. Janin (without stating the facts) in arguing Wiseman v. Chiappella, 23 Howard, 372, from which it was inferred that, *as a general acceptance*, was there said to be an adoption of the description of the drawee's residence, as stated at the foot of the bill, the address is always to be considered, after general acceptance, as the stipulated place of payment.

To show how unfounded that inference is, counsel will state the case from 1 Manning & Granger fully.

As appears from the report, page 83, the plaintiff, to support his case, "produced the bill of exchange which purported to be addressed to the drawee by the description of Mr. Frederick Epworth, No. 38 Minto Street, Baal-Zephon Street, Bermondsey, and appeared to be *accepted by him generally*."

On the day of its maturity plaintiff's agent went to No. 38 and asked of a woman who came out of a passage belonging to the house whether Epworth was there, and was told *he had removed*. The agent left with this woman a card containing notice that the bill was due, and went away without making further inquiry.

Epworth's removal had been to another town. The plaintiff

was held entitled to recover; and Chief Justice Tindall delivers the short opinion copied in full in Mr. Janin's argument.

The court say it was not necessary to present the bill to Epworth personally, and add, "If he chose to *remove* from the house *pointed out by the bill* as his *place of business* he was bound to leave sufficient funds on the premises."

Here the drawer lived at No. 38 *when he accepted the bill. He removed to another city before the maturity of the paper, and of this the holder knew nothing.*

We need not dissent from any thing in Buxton v. Jones. The facts *there* are entirely different from the facts *here.*

In Story on Bills, sec. 48, the very learned author lays it down that the place of payment is "*understood*" to be where the drawee resides, OR where "on the face of the bill it is addressed to him, unless some other place is stated on the face of the bill."

If by this it was meant that the bill is "understood" to be payable at the place of address, *because* the presumption from the general acceptance is that the acceptor resides or has his place of business at such address no issue can be taken upon the proposition, for it is certainly correct to say that the holder, if he *knows no better,* may safely present the bill for payment at the place of address, upon the *presumption of fact* (not of law) *that the place of address is the place to find the acceptor.*

The learned author is supposed to say in the section named that a bill is "understood" to be payable "EITHER" at the residence of the acceptor or at the place of address. But suppose those places are in different cities or states? Then what?

It would seem to reconcile all conflict to hold, in cases of general acceptances like these, that the *residence* is the proper place of demand, *if known,* but the *address* may be safely resorted to if the residence is *not* known. If, however, the learned author meant to lay it down as a matter of legal obligation that the bill is payable at all events at the place of address, we most humbly submit that the authorities he cites in no wise support the proposition. Mitchell v. Baring, 10 B. & C. 4, certainly does

not, nor does Bayley, at the place cited, nor elsewhere, so far as counsel can find.

Marius is not accessible, and Chitty on Bills (star page 172), instead of supporting the proposition, says, "It has been laid down that in all cases the drawer ought to name the place of payment either in the body or subscription of the bill (Marius, 107); but this is not essential, and in general the drawer merely *subscribes the address* to the drawee, *without pointing out any place of payment*, and the bill is *considered payable and to be presented at the residence of the drawee at the time the bill was made or to him personally any where.*"

Indeed, it would seem impossible that the mere address on a bill of exchange could signify more than the address on a letter or an envelope. They all mean simply and only that the person addressed *will then be found there.* That would clearly seem to be absolutely all. And as it is the duty of the holder to find the acceptor or his residence or place of business, it is certainly not diligence to go where he *knows* he will find neither.

Besides, as we have shown, these bills are inland bills, drawn, accepted, and indorsed in Kentucky by parties, all of whom resided there, all of which was known to the bank, and in its hands they are still to be treated as inland bills, though in form foreign bills. Story on Bills, section 24,* contains the following language copied here, though it is not supposed that it makes any material difference whether the bills are foreign or inland:

"But questions may still arise upon the circumstances of particular cases involving considerations of a nice and peculiar character whether a bill is to be treated as a foreign bill of exchange or not. Thus, for example, suppose a bill purporting upon its face to be drawn in Paris, by a person resident there, upon another person resident in London, and yet in point of fact both the parties were resident in London, and the bill was drawn there for the very purpose of giving it the appearance of a foreign transaction and to disguise its domestic origin; the

*See Points XI and XII, page 15.

question might arise, whether upon proof of the facts it should be treated as a foreign bill or not. The rule upon the subject would seem to be that as to third persons who take the bill without notice of its domestic origin it ought to be treated as a foreign bill, but as between the original parties, and those claiming under them with full notice it ought to be deemed a domestic or inland bill."

The only reasoning upon which the above proposition is maintainable must support the views we take upon the main question in these cases.

The sixth error assigned above involves the correctness of the third instruction given by the court (Record, page 14). In that instruction the learned judge put the right of the bank to recover upon *its* lack of knowledge of the post-office address of the plaintiffs in error, ignoring altogether the suggestion that its *agent* might have had knowledge with which the bank would be chargeable, and expressly ruling that there was no evidence that Thompson was its agent. It is conceived that the facts proved as shown in the bill of exceptions (original page 30, printed Record, page 13) were sufficient to constitute Thompson the agent of the bank, and that there was error in this part of the third instruction.

As before stated the instruction is abstract and misleading, because there is not an intimation in the record that the notices when mailed were *post paid.*

Prepayment was essential, and the *onus* is on the bank to show every fact which goes to make up constructive notice as actual notice is denied.

The instruction is especially erroneous because it tells the jury that mailing the notices *on* the 26th day of October (the next day after protest) was sufficient. We maintain that the bank should have made it appear that the notices were mailed in time *to go* by the mail of the 26th. The proof shows a daily mail at least.

The authorities are numerous on this point. We shall con-

tent ourselves with two. Said Chief Justice Marshall, in Lenox v. Roberts, 2 Wheaton, 377, "And it is the opinion of the court that a demand of payment should be made upon the last day of grace, and notice of the default of the maker *be put into the post-office early enough to be sent by the mail of the succeeding day.*" Accordingly also is Dickens v. Beal, 10 Peters, 581.

If the mail left New York at noon notice mailed at 1 P. M. would have been insufficient. The plaintiffs received no actual notice. The law allows certain facts to be equivalent to actual notice, but not until these facts are made to appear by the party to whom the privilege is allowed. These facts are not shown in this record.

The Seventh and Eighth errors assigned grow out of the action of the court in ruling on the question of the agency of G. V. Thompson. (Record, pp. 15 and 16.) We conceive these questions to be extremely important.

The bank held the original bills. It placed them in the hands of E. M. Wright & Co. "for the purpose of having them renewed." (Original, p. 30, printed Record, p. 13.) Wright & Co. resided in New York, but undertook the work of securing the renewals at the request of the bank. The bank then knew that all the other parties to the bills resided in Kentucky. It was not expected, of course, that E. M. Wright & Co. should go to Kentucky about the bills, nor were they paid for securing the renewal. It was indispensable that they should send them to somebody there. In doing this a subagent was absolutely essential, and E. M. Wright & Co.'s authority to employ one is clearly to be implied. Story on Agency, sections 14, 201, 217*a*; Dorch. & Milt. Bank v. N. E. Bank; 1 Cushing, 177, where it was held that "An agent has no right to delegate his authority to a subagent without the assent of his principal; but where, from the nature of the agency, a subagent must necessarily be employed, the assent of the principal is implied, as where a draft payable at a distant place is left with a bank for collection, it must be presumed that it is intended to be transmitted to a subagent at the

place where it is payable, and not that the bank is to employ its own officers to proceed there to obtain payment."

We take it therefore to be clear that when E. M. Wright & Co. sent the bills to Thompson, at Hopkinsville, they were merely transmitting them to him *for the holder* (the bank), whose agent Thompson then became, whether they ever heard of each other or not.

Bank of Washington v. Triplett, 1 Peters, 30; Story on Agency, 14, 201, 217 *a*.

Thompson then knew the post-office address of all the plaintiffs in error in each of these cases, and his knowledge in the premises is to be imputed to the bank for which he was acting.

In Hoover v. Wise, 91 U. S. 310, this court said, "The general doctrine that the knowledge of an agent is the knowledge of the principal can not be doubted."

And further, "Neither can it be doubted that when an agent has power to employ a subagent, the act of the subagent, or notice given to him in the transaction of the business, has the same effect as if done or received by the principal."

The bank having through E. M. Wright & Co. sent the bills to Thompson for the purpose of renewal, was bound by Thompson's act, because he *was* its agent, and it recognized his acts by receiving the new bills.

If Thompson had been guilty of any negligent default by which the bank had suffered its remedy would have been against him alone.

Bank of Washington v. Triplett, 1 Peters, 30.

The bank surely was the holder of the bills, and the first instruction asked by plaintiffs in error (Record, p. 14) should have been given.

However, Wright & Co. may have had the beneficial interest in them. If so, Thompson was certainly Wright & Co.'s agent.

The court (Record, p. 16) instructed the jury that if they believed the bills were *pledged* to the bank by Wright & Co. then the bank was not chargeable with Thompson's knowledge.

This can only be correct upon the idea that the pledging the

bills did *not* make the bank the *holder* of them, but still left the bills the property of E. M. Wright & Co.

If this be so, then the bank is only the agent or stakeholder or trustee of an express trust for E. M. Wright & Co., and it would seem clearly to follow that as E. M. Wright & Co. were obviously chargeable with Thompson's knowledge, the cases can not be relieved of that feature by the situation of the bank.

The bank is either the holder or not of the bills. If it is, then we have shown it is chargeable with Thompson's knowledge. If it is not the holder, then E. M. Wright & Co. are, and the same result follows.

The ninth error assigned raises the question of the sufficiency of the diligence of the bank in obtaining information of the post-office of the drawer and indorsers, independently of the agency of Thompson.

We contend that there was not sufficient diligence in this case, the bills being payable in Kentucky, where, as the bank knew, the plaintiffs in error all lived. It was not sufficient to wait until the day of protest and then only make inquiry on that day (or the next) of only one indorser in New York, and not elsewhere, though telegraphic communication existed between Hopkinsville and New York.

For an express authority on this point we call attention to Hill v. Varrall, 3 Greenleaf, 233.

It is true that the date of a bill affords some presumption, but only slight, that the *drawer* lived at Hopkinsville, but none whatever that the *indorsers* did.

2 Daniel Neg. Ins. 74; 1 Parsons Bills and Notes, 493, in note; Lowry v. Scott, 24 Wendell, 358; Spencer v. Bank of Salina, 3 Hill, 520.

May it please the Court:

We most respectfully submit that the learned and lamented judge who tried these cases took a radically wrong view of the principles of law applicable to them.

WALTER EVANS,
Counsel for the Plaintiffs in Error.

Supreme Court of the United States.

No. 183.

COX & WHITLOCK, PLAINTIFFS,

vs.

NATIONAL BANK OF THE STATE OF NEW YORK, DEFENDANTS.

No. 184.

COX & CLARDY, PLAINTIFFS,

vs.

THE SAME DEFENDANTS.

REPLY.

Counsel for the plaintiffs in error questions no *authority* cited for the defendants in the "Statement and Points" filed by their counsel.

We contend that nothing on the bills in suit makes them payable anywhere else than at the residence or place of business of the acceptors, and that due diligence required a demand of payment at one or the other; while our opponents insist that the *address* on the bills makes them payable at New York, notwithstanding the holders knew all the time the bills existed that both the residence and place of business of the acceptors were in Kentucky, and not elsewhere.

The first clause of point I states clearly the bank's posi-

tion, but this contention is required by the exigencies of its cases, and is supported by no authority but the decision we seek to reverse.

The authorities cited in support of that proposition established nothing more than that demand at the place of payment is good, which all must admit.

The question here to be determined is, What is the place of payment? And on that inquiry the authorities cited shed no light whatever..

We still ask attention to the cases upon this point noted upon our brief, and in addition copy section 1180, volume 2, of Daniell on Negotiable Instruments. Says that learned author:

"When a foreign resident dates a bill or note in another State, where he executes and delivers it, and if he" (doubtless the holder is meant) "knew of such foreigner's residence at the time he received the notes, or learned it within such period as afforded him time to present it, it would be his duty to do so. Whether, indeed, the holder would be excused if misled by the date, is questionable. Certainly the burden would be upon him to show he was misled. In all cases the holder must exercise due diligence, and the only question is what due diligence requires. The holder may, as it seems, presume the party making the note to reside where he dated it, and may proceed accordingly to inquire for him at that place and prepare to make presentment there at maturity. If then he learns for the first time that he resides elsewhere, his failure to present it to him would be excused."

The true place of payment of these bills was the residence or place of business of Cox & Cowan, wherever that was. If the bank had not known where they were in fact, demand might have been made in New York; but as they did know all the time, their negligence was inexcusable, and released the plaintiffs in error.

The place of payment of a bill (other than the residence or place of business of the acceptor) is always a matter of

special agreement, which may be in parol. (13 Peters, 150.)

It is nowhere alleged by the bank that there was any agreed place of payment, and that there was such is expressly denied by the plaintiffs in error.

Had there been an allegation by the bank of such an agreement, the address might possibly have been some evidence, though very slight, of the truth of the allegation; but it would only have been *evidence* of the agreement, and *not the agreement itself*, and just in this place exists one vice of the ruling of the court below.

It is plain that the maker of a note and the acceptor of a bill occupy the same position, and that their legal obligations are precisely equivalent. Write out in these cases the obligation in full of Cox & Cowan, as found on the bills in suit, and it is exactly this: "New York, N. Y., August 3, 1875.—Eighty days after date we promise to pay to J. C. Whitlock five thousand dollars."

This cannot be incorrect, and, it seems to counsel, shows conclusively that the cases of Taylor *v.* Snyder, Spies *v.* Gilmore, Bank *v.* Whittemore, &c., perfectly rule those under hearing.

It may be that text-books sometimes say that the place of address is the place to present a bill, and this is ordinarily true, *because* the address is nearly always the real place of business of the acceptor; *but we draw especial attention to the fact that every case cited to support such a statement is where the bill was properly addressed, but afterwards there was a removal, of which the holder only learned at or near the maturity of the paper.*

The Italians formerly wrote the whole address on the back of bills of exchange, as we do on letters, but the English and American practice, while it means only the same thing, is obviously more convenient, and when in either

case we supply the ellipsis logically, the words of locality added to the name of the drawee are only used to identify him and point out his whereabouts.

Of course a false indication may be given in various ways, and if this should mislead, the party who caused the injury would have to suffer; but in the cases at bar no one was misled as to the locality of the acceptors, nor in anywise.

The ordinary man to whom a bill is addressed takes little notice of the mere place at which it is directed to him, and probably he would never suspect that underneath that mere direction there lurked an order to pay at that place. We are a travelling people, and it must be common for persons to have bills addressed to them at places where they are temporarily sojourning. They are accepted without its ever being supposed that they will be presented for payment there by any one acquainted with their actual residence or place of business. The various judges of the country have most likely had experience of this sort, and never dreamed of being called on to pay elsewhere than at home. Following out these ideas will suggest many injurious and inconvenient consequences that would ensue if the doctrine of the court below—that the mere address absolutely fixes the place of payment—is established. The proposition strikes counsel as being as wholly unsustainable on principles of law or reason as it is on authority.

There is neither allegation, proof, nor suggestion of any usage or custom applicable to the question. Certainly of none in Kentucky, where the bills were accepted and indorsed.

II.

The proof was, that the notary who protested the bills on the 25th day of October, 1875, mailed notices thereof to the plaintiffs in error *on the 26th*, and the court below

instructed the jury, if they believed this, the notice was sufficient, &c.

To this ruling we excepted, and in our original brief stated that numerous authorities supported the clear rule of this honorable court laid down in Lenox *v.* Roberts, 2 Wheat., 377. Among those cases are—

Dodge *v.* Bank of Kentucky, 2 J. J. Marsh., 616.
Lawson *v.* Farmers' Bank, 1 Ohio St., 542.
Story on Bills, sec. 288.
1 Amer. Lead. Cases, pp. 390–392.

In 2 Daniell on Negotiable Instruments, section 1039, the doctrine for which we contend is thus stated:

"When the parties reside in different places, and there is mail communication between them, the rule laid down by the United States Supreme Court is that the notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided that such mail is not closed before early and convenient business hours of that day; in which case it must be sent by the next mail thereafter. In other words, the notice must be sent by the first mail which leaves after the day of dishonor is past, and does not close before early and convenient business hours of the day succeeding the day of dishonor; the design of the law being to afford the holder an opportunity to mail the notice on the day succeeding that of dishonor. This rule is sanctioned by numerous and eminent authorities, either expressly or by implication, and it seems to us adopts the only principle which may be followed in all cases."

And we insist that the burden is on the holder to show these facts affirmatively and clearly.

Testing the instruction by these authorities, it is clear that the rule was stated too broadly; that it was stated inexactly, and should not have been given.

III.

We have already sufficiently adverted to the facts in the record which made it erroneous for the court below to rule

that there was no evidence showing that G. V. Thompson was the agent of the bank in legal contemplation. We contend that those facts authorized Wright & Co. to employ Thompson as a sub-agent, and that when he was so employed he became the agent of the bank.

Besides the authorities already noted, we beg to call attention to sections 30, 31, and 32 of Wharton on Agency.

IV.

The notices of protest do not appear to have been post-paid. They were not in fact received. They were sent to the wrong post-office, though Thompson, the plaintiff's agent, who for them renewed the bills, knew the proper post-office address of each of the plaintiffs in error.

The burden of proof is on the bank. They prove few, if any, of the facts essential to constitute constructive notice.

In fact, instead of using the indispensable due diligence to hold parties bound whose only liability depends on such diligence, the bank lazily and negligently failed to take any step required by law to charge the plaintiffs.

V.

On page 3 of the "Statement and Points" filed by defendant, we find the statement italicized that there was no evidence tending to prove that the bank knew that Newstead, Ky., was the place of business of Merritt Cox, J. D. Clardy, and J. C. Whitlock.

These gentlemen were not the acceptors of the bills. The *place of business* of the *acceptor* is the place of payment, but the *post-office* of the *drawer* and *indorser* is the place to which *notice of protest* should be sent.

VI.

The acceptors are bound at all events, of course, and have no interest in these questions. As between them

and the holder, it was their duty to hunt him up, and no demand was necessary. But there is nowhere on the paper a *promise* by the *drawer* or the *indorser* to pay. What they do is to order others to pay. True, it is settled law that, under strict compliance with certain conditions as to diligence, demand, notice, &c., they are bound to repay the holder; but this is a purely technical liability, and in no other way are they bound. Unless these conditions are complied with, they have none of the chances of securing themselves which it is the object of the law to give them by requiring demand, notice, &c.

Most respectfully submitted,

WALTER EVANS,
Counsel for Plaintiffs.

Supreme Court

OF THE UNITED STATES.

No. 184.

MERRITT COX AND J. D. CLARDY,
PLAINTIFFS IN ERROR,
vs.
THE NATIONAL BANK OF THE STATE OF NEW-YORK.

No. 183.

MERRITT COX AND J. C. WHITLOCK,
PLAINTIFFS IN ERROR,
vs.
THE NATIONAL BANK OF THE STATE OF NEW-YORK.

In Error to the Circuit Court of the United States for the District of Kentucky.

Statement and Points on behalf of the Defendant in Error.

Wm D Shipman

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New-York:
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1879.

Supreme Court of the United States.

MERRITT COX and J. D. CLARDY, Plaintiffs in Error, *vs.* THE NATIONAL BANK OF THE STATE OF NEW-YORK.	*No.* 184.
MERRITT COX and J. C. WHITLOCK, Plaintiffs in Error, *vs.* THE NATIONAL BANK OF THE STATE OF NEW-YORK.	*No.* 183.

STATEMENT AND POINTS ON BEHALF OF THE DEFENDANT IN ERROR.

STATEMENT.

The facts in these two cases are in substance identical. They are respectively actions against the drawers, endorsers and acceptors of a bill of exchange, the difference being that in the one first mentioned J. D. Clardy was the payee and endorser, and in the one secondly referred to, J. C. Whitlock was the payee and endorser of the bill. The bills were drawn by the same person, were both for the

same amount, and payable at the same time. It is, therefore, understood that the cases shall be argued together and upon one brief.

The following statement of facts is applicable to both cases, the references to the Record being to the first of the above named cases:

At the several times in question the defendants were all residents of the State of Kentucky. The acceptors of the bills, W. F. Cox and Wm. Cowan, were partners under the name of Cox & Cowan. The drawer of the bills was Merritt Cox. They were drawn on the 3d of August, 1875, dated at Hopkinsville, Ky., addressed to W. F. Cox and William Cowan by their firm name of Cox & Cowan, *at the City of New-York*. One of them was drawn to the order of J. D. Clardy for the sum of $5,000, payable 80 days after date. It was accepted by Cox & Cowan in their firm name, endorsed by J. D. Clardy, the payee thereof, to Edward M. Wright & Co., of New-York City, delivered to Wright & Co., and by the latter endorsed for a valuable consideration to the defendant in error before maturity. The facts are precisely similar in regard to the other, except that Whitlock was the payee and endorser. The bills not being paid at maturity, the defendant in error placed them in the hands of a notary public, who presented them at various places in the City of New-York, making careful search for the acceptors, especially at the office of Wright & Co., through which it was understood that the defendants transacted business, and there he demanded payment thereof, which was refused. The notary then protested the bills. (Record, pp. 1, 2.)

On the day of maturity of the bills, which was the 25th day of October, 1875, or the following day, the address of the drawer and endorsers not being known, the notary, on inquiry of E. M. Wright, was informed that the post office address of the defendants, Merritt Cox and J. D. Clardy, respectively, the former being

the drawer of the bills and the latter the endorser of the first bill, and of Whitlock, the endorser of the second bill, was Hopkinsville, Ky., and on the 26th of October, 1875, he mailed notices of protest of the bills to those defendants at that place. (P. 13.)

The plaintiffs in error, Merritt Cox and J. D. Clardy and J. C. Whitlock, offered evidence to prove that the bills when drawn were delivered to one Thompson, sent by Thompson to Wright & Co., who delivered them to the defendant in error, informing it that the bills had been executed and accepted in Kentucky. They also offered evidence tending to prove that the defendant in error when it took the bills was informed and knew that the residence and place of business of Cox & Cowan was in the City of Hopkinsville, Kentucky, also that there was no presentment of the bills at their residence and place of business in Kentucky. They also offered evidence tending to prove that the residence of Merritt Cox and of J. D. Clardy and J. C. Whitlock was Newstead, Ky., but *no evidence tending to prove that the holder of the bills, the defendant in error, knew that this was their place of business.*

The defendant in error, on the other hand, offered evidence to prove that no sort of agency existed between Thompson or E. M. Wright & Co. and the defendant in error; that Thompson had at no time any communication with the Bank, and never informed the Bank or Wright & Co. of the post office address of either of the plaintiffs in error. (Record, pp. 14, 15.)

The Court instructed the jury, that the bills of exchange were in law payable in the City of New-York, notwithstanding the plaintiffs may have known before making acceptance and endorsement thereof, that the acceptors, Cox & Cowan, actually resided at Hopkinsville; that if the jury believed that the notary made reasonable and diligent inquiry for the acceptors at their place of business in New-York, at the place or places frequented by them in that city,

and could not after such inquiry find them or their place of business, then the demand of payment during business hours on the day of the maturity of the bill at the place so frequented by them in the City of New-York was sufficient; that if the Bank did not know the post office address of the drawer, Merritt Cox, and the endorser, J. D. Clardy, and the endorser, J. C. Whitlock, and if the notary made inquiry as to their several post office addresses of Wright & Co., who had assigned the bills to the plaintiff, and who were the correspondents of the acceptors, and in the judgment of the notary were likely to be informed as to such post office addresses, and who professed to know them, and was informed that their post office address was Hopkinsville, Ky., and if the notary transmitted notices on the day after the protest by mail, postpaid, to the drawer and endorsers at the post office address so ascertained by the notary, such notice of protest was good to bind the drawer and endorsers respectively.

The plaintiffs in error excepted to these several instructions, and they also made several requests for instructions, each of which were refused. These requests it is unnecessary to notice, for if the exceptions to the charge of the Court are not well taken, as it covered the whole case as presented upon the evidence, the requests to charge certain abstract propositions were properly overruled.

POINTS.

I.

The bills were addressed to the drawees, *at the City of New-York*, and not elsewhere. They were accepted generally. They were, therefore, payable at the City of New-York.

No matter in what part of the world the acceptors may, in fact, have dwelt, when they accepted a bill addressed to them at New-York, they elected their residence there for the purpose of the presentation and payment of the bill.

Smith *vs.* Little, 10 *N. H.* 526.
1 *Am. Lead. Cas.*, 5th Ed., p. 454.
Story on Bills, Sec. 353.
Chitty on Bills, pp. 397, 172–175, 322, 323.

The duty of the holder is performed when he has made diligent effort to find the acceptor at the place where he has undertaken to pay the bill.

It follows, that the charge on this point was right.

Story on Bills, Sec. 351 and note.
3 *Kent's Com.*, 12th Ed., p. 96 and notes.
Parsons on Notes and Bills, V. 1, p. 440 and note.

II.

In the next place, as to notice to the drawer and endorsers.

It is not claimed by the plaintiffs in error that notice was not given in time. Indeed, it is proved to have been given on the very day or the day after the protest. But it is said notice was sent to the wrong post office.

In answer to this, it is enough to say that the holder did not know the address of the drawer and endorsers, and that on making inquiry in the only available quarter the notary was informed that the proper address was Hopkinsville, and accordingly sent the notices to that place.

The charge on this point was clearly within the rule laid down in Lambert *vs.* Ghiselin, 9 *Howard*, 256.

See, also, Hunt *vs*, Maybee, 3 *Seld.* 266.
Story on Bills of Exchange, §§ 299, 308, 351, 387.
Parsons on Notes and Bills, pp. 490, 491, 365, 366.

III.

The exceptions should be overruled.

Wm D Shipman

W. W. MACFARLAND,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1879.

The United States

v.

Francis J. Lippit

No. 879

APPEAL FROM THE COURT OF CLAIMS.

Supplementary brief for the United States.

The discussion previous to, and contemporaneous with, the passage of this bill both in the Senate and House sustains the view that it was considered by both those bodies that the bar of this statute would be complete everywhere against claims cognizable by the Court of Claims when the limitation of six years had expired.

(Cong.Globe, Part 2, 1st Sess., 36th Cong., pp. 982 - 4.
Cong.Globe, Part 4 and Appendix, 2nd Sess., 37th Cong.,
pp. 123 - 4.
Cong.Globe, Part I, 3rd Sess., 37th Cong., pp. 393- 9,
415, 420, 421, 423.)

Chas. Devens

Attorney General.

Thomas Simons

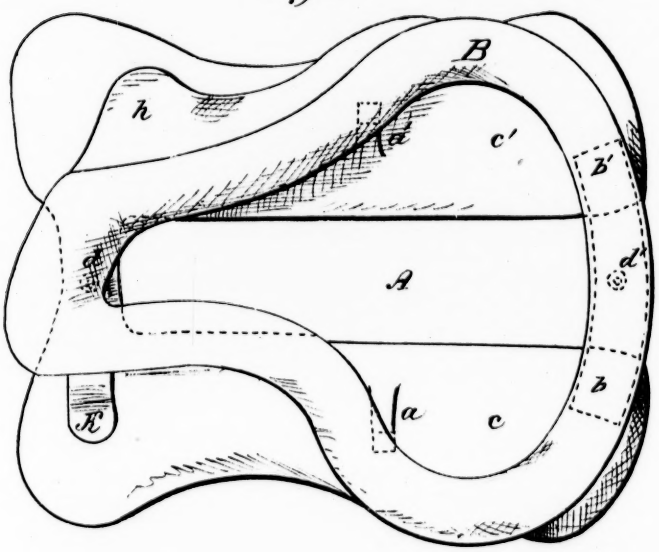
Assistant Attorney General.

J. Shelly.

Side Saddle Tree.

No. 97,236. Patented Nov. 23. 18

Fig. 1



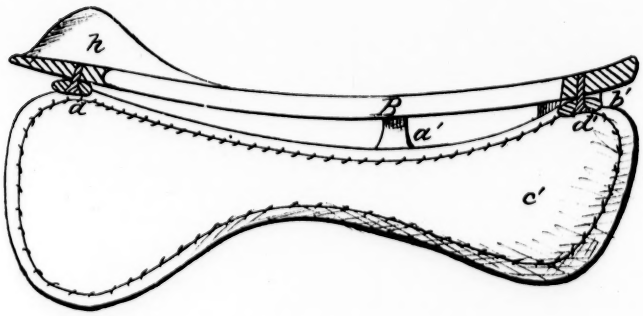


Fig. 2.

Witnesses.
John J. Grumsley
Lewis Myers.

Inventor.
Jno. Shelley
By Sam'l S. Boyd
Atty.

O. V. FLORA.

SIDE SADDLE TREE.

No. 177,233. Patented May 9, 1876.

Fig. 1.

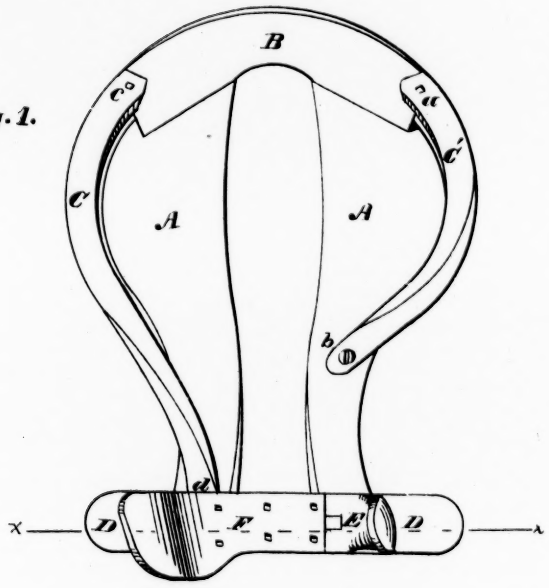


Fig. 2.

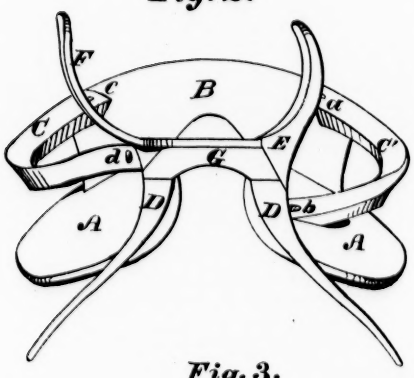
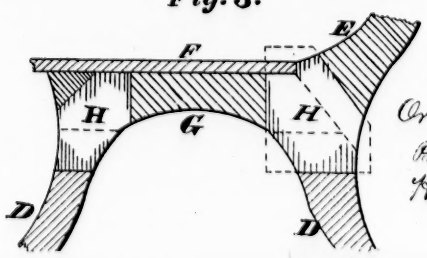


Fig. 3.



Attest:

R. Connett

M. A. Gordon

Inventor:

Orlando V. Flora

By Henry Connett Jr

Attorney

What must be done when a Check is presented for deposit, before the Receiving Teller can know that the Check is good?

1st. The Receiving Teller must go or send to the Bookkeeper, (F.) to know what the parties balance on the books is.

2d. He must then go to his own desk, (A.) and examine all the deposit tickets to see how much the party has deposited, which has not yet got to the Bookkeeper.

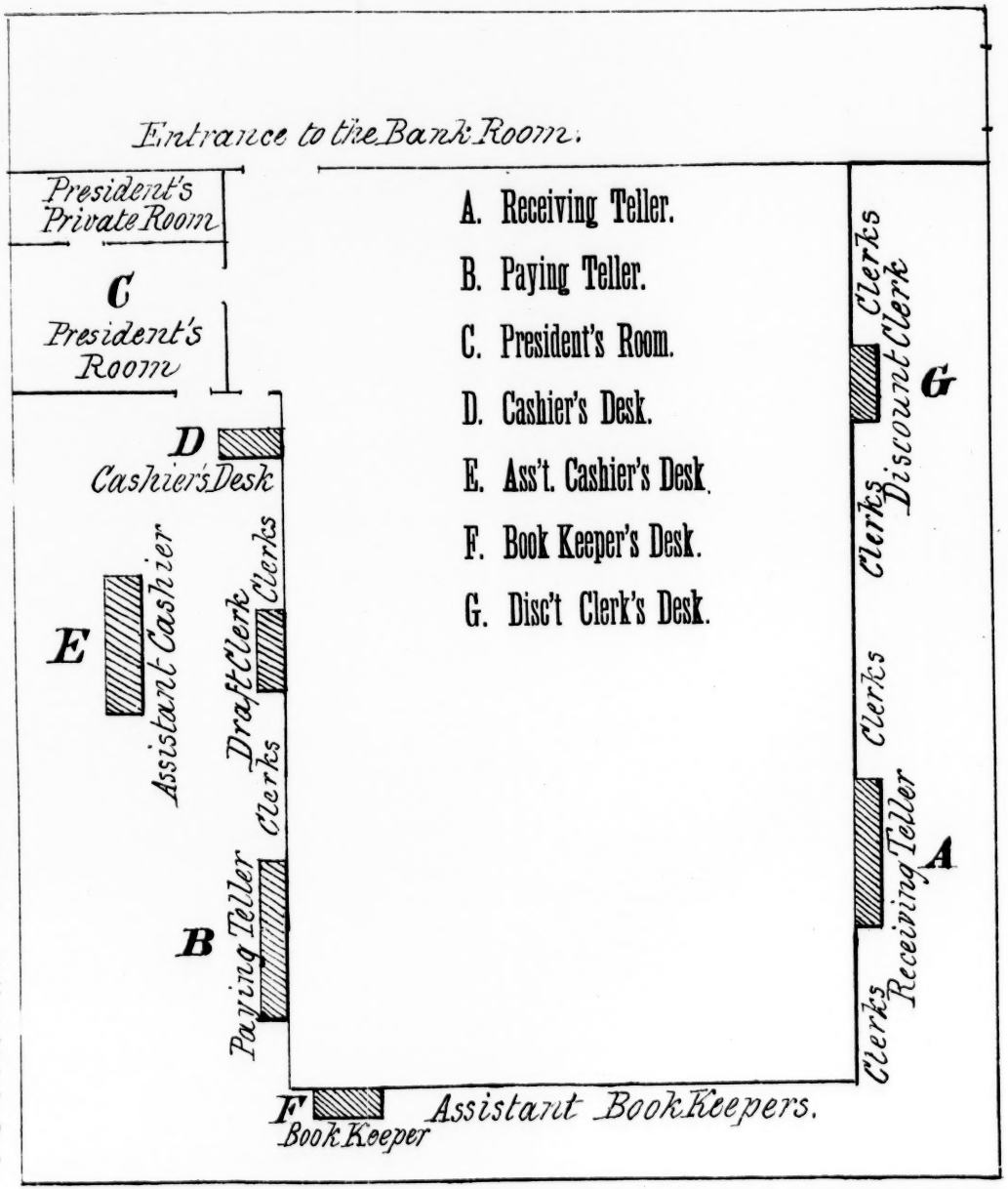
3d. He must then examine all the checks received by him during the day, to see if the party has not drawn checks which have gone to the credit of other parties.

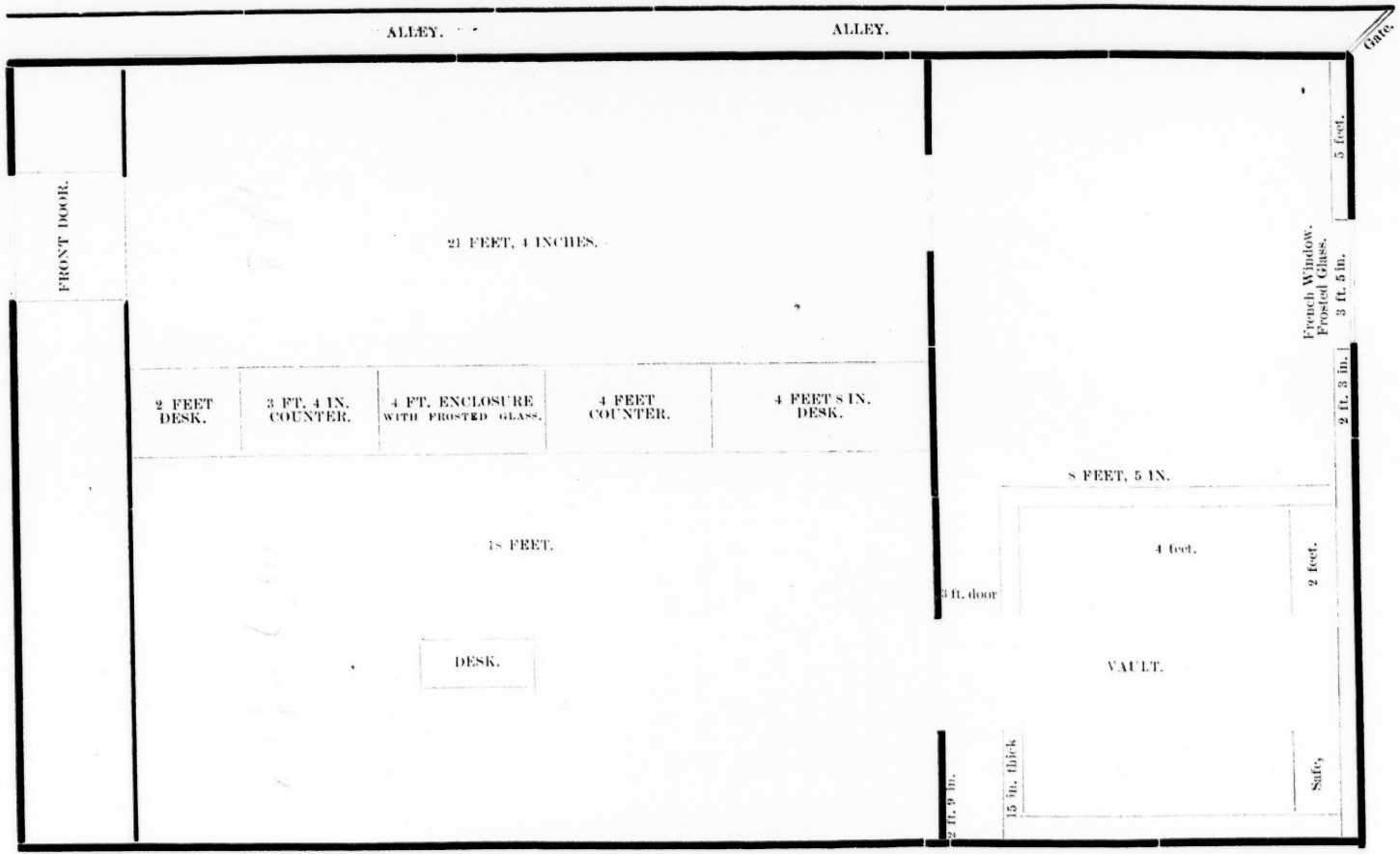
4th. He must go to the Discount Clerk's Desk (G.,) to learn what discounts have been entered upon his Pass Book during the day.

5th. He must then go to the President (C.,) the Cashier (D.,) or the Assistant (E.,) to learn whether the depositor has been promised any discounts, or been permitted to overdraw his account during the day.

6th. He must then go to the Bookkeeper to ascertain whether he has had any checks certified during the day, which certifications amount to payments.

This will take 10 to 15 minutes in which the business of the Bank must stop. In the mean time there may be a dozen or more waiting at the Receiving Teller's counter, and as many at the Paying Teller's counter to deposit or draw money. It is evident that practicably no business could be carried on in this way.




ALLEY.
ALLEY.
Gate.
FRONT DOOR.
21 FEET, 4 INCHES.
5 feet.
French Window.
Frosted Glass.
3 ft. 5 in.
2 ft. 3 in.
2 FEET DESK.
3 FT. 4 IN. COUNTER.
4 FT. ENCLOSURE WITH FROSTED GLASS.
4 FEET COUNTER.
4 FEET 8 IN. DESK.
8 FEET, 5 IN.
18 FEET.
4 feet.
2 feet.
3 ft. door
DESK.
VAULT.
15 in. thick
Safe,
2 ft. 9 in.